

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

377

PETITION FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,198

UNITED STATES OF AMERICA, *Appellee*,

v.

WALTER R. REYNOLDS, *Appellant*.

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 2 1972

Nathan J. Carlson
CLERK

WILLIAMS, CONNOLLY & CALIFANO

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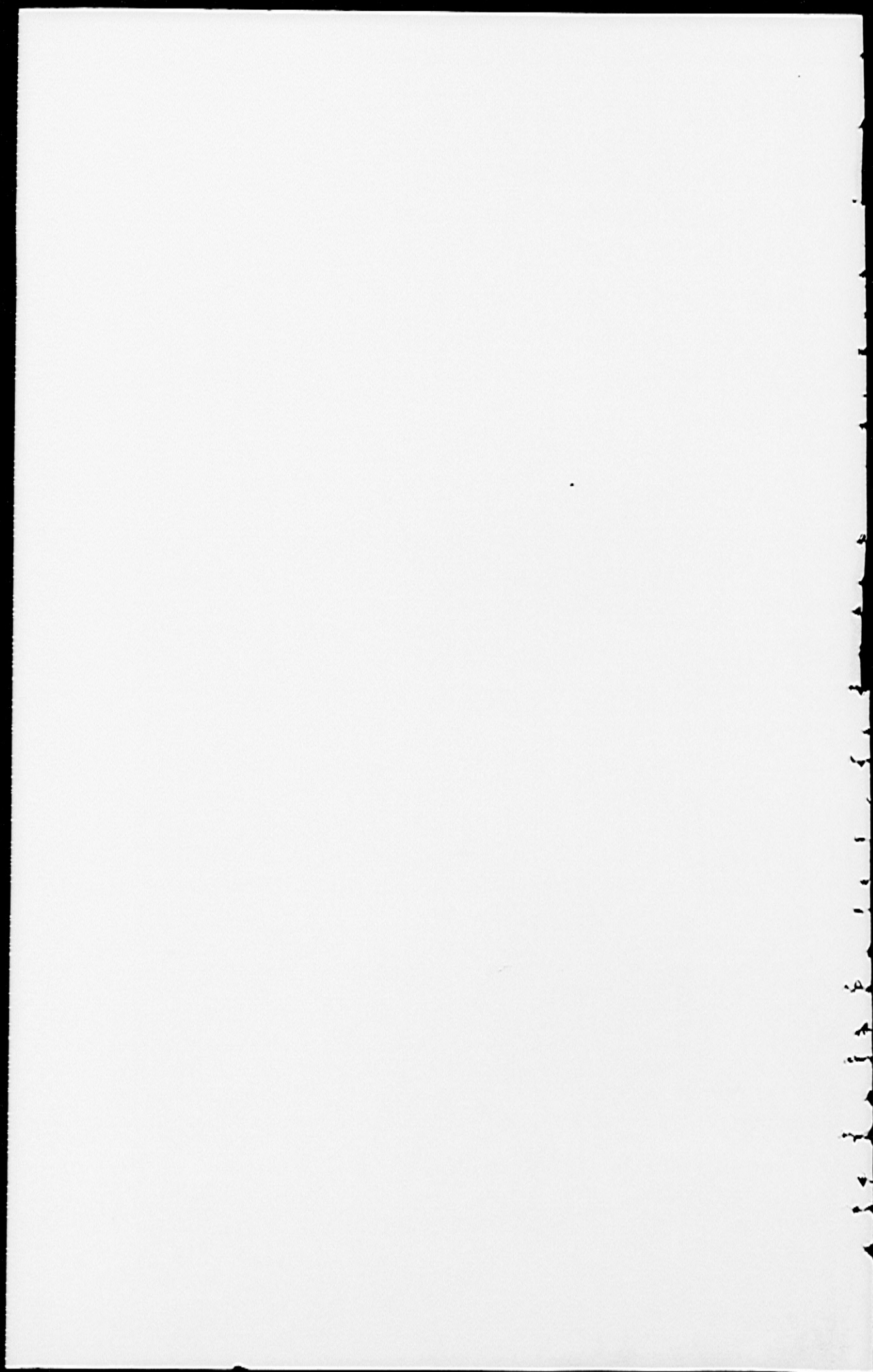
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,198

UNITED STATES OF AMERICA, *Appellee*,

v.

WALTER R. REYNOLDS, *Appellant*.

PETITION FOR REHEARING

Pursuant to Rule 40, Fed. R. App. P., appellant Walter R. Reynolds respectfully petitions for rehearing of the Court's decision of December 20, 1971. This petition is timely because the Court has enlarged the time within which it may be filed to and including February 2, 1972.

POINTS FOR REHEARING

1. In rejecting appellant Reynolds' claim that his right of cross-examination was impermissibly abridged, the Court wrongly read out of the record the prejudicial restriction placed by the trial court on defense counsel's cross-examination.

2. In rejecting appellant Reynolds' claim that the grand jury, including the foreman, failed to pass on the actual

terms of the indictment, the Court misapprehended the transcript, and therefore did not rule on the contention advanced by appellant Reynolds.

3. In rejecting appellant Reynolds' Fourth Amendment claim, the Court on its own initiative improperly found critical facts relating to appellant Reynolds' consent to the IRS search.

1. The Denial of the Right of Cross-Examination

The Court correctly writes (page 22)¹ that "if we were to find that the trial judge in fact denied [appellants the right of cross-examination] we would be duty-bound to reverse the convictions." The Court acknowledges (page 24, footnote 13) that the District Court believed that it had restricted the right of cross-examination. But, incredibly, this Court, in order to affirm the judgment, holds that the District Court was "mistaken" and "confused" in this belief.

Appellant Reynolds submits that the District Court was *not* mistaken and confused. The Government's trial strategy depended upon defendants being precluded from inquiring into the issue of whether the bank actually relied on the false loan documents. The District Court's ruling, which foreclosed inquiry into that issue, effectuated that strategy. The transcript shows that when trial counsel for appellant Reynolds first attempted to explore with Stoy whether the bank actually relied on the false loan documents, he was cut off by the sustaining of a Government objection.² JA 86-87. Subsequently, when cross-examin-

¹ All page references in parentheses are to the Court's slip opinion, filed on December 20, 1971.

² Trial counsel commenced his initial line of inquiry with certain payment books because the bank sent one of its officers, with payment books in hand, to RCC to collect monthly mortgage payments owed by the straws. As the bank was paid each month by a single check drawn by RCC, it was defendant's contention that the bank knew that the purchasers were straws and therefore did not rely on the false loan documents. For a detailed account, see footnote 21, pages 31-32, Brief for appellant Reynolds.

ing Harrison, trial counsel for appellant Reynolds again attempted to show that the bank knew about the straw transactions (JA 98) and, *in an incident simply ignored in the Court's opinion* (JA 98-99), was immediately cut off by the District Court (JA 98) and was further admonished at a short bench conference (JA 98). Following the next question the District Court reconvened counsel at the bench and again announced his adherence to his earlier ruling—"I will stand on my ruling" (JA 100)—referring of course to the ruling at JA 87.³

We again set forth the pertinent paragraph of the District Court's opinion because it accurately summarizes what happened:

"The Government was particular to restrict its direct examination of bank officials to the general practices which the bank followed after loan applications were received. The Government offered no evidence about the specific treatment of the seventeen applications in question. When the defendants attempted on cross-examination to enter this area, the Government successfully objected on the grounds that direct examination had been limited to Eastern's general practices. (Tr. 127-28 [JA 86-87]). Throughout the proceedings, the Government adhered to the position that, on the strength of evidence about the general practice of Eastern to require, accept and process loan applications, a jury would be fully justified in inferring that the applications which the defendants submitted were in fact relied on by Eastern as the basis for making loans."

In the trial below defense counsel understood that because of the Court's ruling they could not inquire into the knowledge of the bank officials concerning the straw nature of the seventeen transactions and thus could not explore whether the bank actually relied (as opposed to inferen-

³ In footnote 14, pages 26-27, of the Court's opinion, the transcript is set out beginning at JA 99. The transcript should have been set out beginning at "(At The Bench)" on JA 98. When the entire dialogue is read, the District Court's ruling is not confusing, contrary to this Court's intimation (page 27).

tially) on the false loan documents. It is for this reason, for example, that in his closing argument counsel for defendant Rogers noted, without Government objection, that the Government had prevented defense counsel from exploring the bank's actual behavior. Transcript of closing argument, May 15, 1969, pages 65-66. To further underscore this point, trial counsel for appellant Reynolds has filed an affidavit with this Court which states that his understanding of the District Court's ruling was precisely the same as that expressed by the District Court in its post-trial opinion.

If this Court, after reviewing this petition and the record, still has doubt about the accuracy of what the District Court wrote in its post-trial opinion, then it should remand this case to that Court for further clarification on this subject instead of undertaking to speculate, as the Court has now done, on whether the District Court was "mistaken" or "confused." Whether defense counsel were restricted about inquiring into the bank's reliance on the false loan documents is a question of fact, and the District Court, as finder of fact, is exclusively empowered to make this decision.⁴ As a result, if this Court is still in doubt, it should give the District Court a renewed opportunity to rule on this factual issue. Indeed, if this Court still has doubt, a remand is very clearly the only course consistent with the fair administration of justice.

2. The Indictment

The Court writes (page 11) that Evan L. Swain, the foreman of the grand jury, "stated in open court that on the date the indictment was returned the Government attorney read the first count to the grand jury in its entirety, as did he the second count, and that he then proceeded to summa-

⁴ Similarly, it would be a question of fact whether defense counsel knowingly waived his client's right to cross-examination. The presumption is against waiver of constitutional rights, and in light of the affidavit submitted by Reynolds' trial counsel in support of this petition we submit that it is most unlikely that the District Court would find such a waiver.

rize the remaining counts to the grand jury explaining that the language of each of these counts was the same as that in Count II and that the only difference in each of these counts was the date and the amount of the given loan in question." Swain's testimony totally lacks, however, the detail ascribed to it in the opinion of the Court. Foreman Swain testified that the prosecutor read "the first part"; he had little further recollection. JA 67, 69. As the prosecutor remarked during the hearing, Swain's recollection was "vague." JA 65.

The Government contended at the hearing that its counsel had "thoroughly reviewed" the indictment with the grand jury. *Contrary* to the statement in the Court's opinion (page 12), however, Government counsel did *not* testify in support of their contention. While the Court in its opinion (indented paragraph, page 12) relies on the "testimony" of Mr. Burns, Mr. Burns was not even involved in this case at the grand jury stage and therefore had no first-hand knowledge.⁵

Admittedly, Mr. Molenof claimed that he read Counts I and II, and that he further "advised" the grand jury of the remaining counts, explaining, according to him, "what each and every succeeding count, pointing out the language" (JA 70) but he did *not* testify and was therefore not cross-examined on these assertions of his recollection of events which had transpired months before.

Because the Court misapprehends the testimonial record, it also misapprehends (page 14) appellant Reynolds' contention. His argument is not predicated on the assumption that the prosecutor read the indictment to the grand jury (compare the Court's opinion, page 14), but rather on the testimony of Foreman Swain that he (Swain) had not read

⁵ The first mention of Mr. Burns in the record of docket entries is on September 20, 1968, a year after the indictment was returned. In the language italicized by the Court (page 12), moreover, Mr. Burns is misstating Foreman Swain's testimony. The Court is respectfully requested to re-examine Foreman Swain's testimony at JA 62-69.

the indictment (JA 68) and that Mr. Molenof had read "just the first part." (JA 69) Consequently, the testimonial record not only *lacks* affirmative evidence that the prosecutor read the indictment in full to the grand jury, but the testimony is, to the contrary, that he read "just the first part." On the basis of the testimonial record, therefore, the Court cannot rightly conclude that the grand jury or any member of it actually passed upon the terms of the indictment.

Accordingly, appellant Reynolds asks the Court to reconsider his claim that the grand jury failed to pass upon the actual terms of the indictment. If the position of the Court then continues to depend upon what Mr. Molenof said he did, or what Mr. Burns characterized Mr. Molenof as having done, the Court should remand the case for an evidentiary hearing that tests the accuracy of their unsworn assertions.

3. Motion To Suppress

In sustaining the trial court's ruling denying appellant Reynolds' motion to suppress, the Court properly focuses (pages 33-34) on the initial meetings of Agent Evangelist and George W. Steele, Reynolds' accountant. The Court finds as a fact (page 34) "that as a man of considerable experience in the world of finance Steele was aware of the potential criminal aspects of the civil audit."

There is no factual finding in the opinion of the District Court (Brief for appellant Reynolds, pages 1a-22a), however, that Steele then knew that Agent Evangelist was searching for evidence of crime. There is also no factual basis for concluding from Steele's testimony (JA 27-36) that he then knew that Agent Evangelist was looking for evidence of crime.

To underscore the serious injustice that may result when, as here, an appellate court has improperly intruded into

the fact-finding function of a trial court, we have filed with this Court an affidavit signed by Steele. If he were called upon to testify, a court empowered to find facts could certainly find that he then had no reason to believe and did not believe that Agent Evangelist was looking for evidence of crime.⁶

In attempting to dispose of appellant Reynolds' Fourth Amendment claim, the Court has plainly decided an issue of fact—Steele's knowledge at that time—which was not decided by the District Court but which is within the exclusive province of that court to decide. As the Court's rejection of appellant Reynolds' Fourth Amendment claim now rests on a factual finding *not* found by the District Court, again the Court's only proper course is to vacate its opinion and judgment and remand the case for a factual determination of Steele's knowledge at the time of the initial meetings between him and Agent Evangelist.

Respectfully submitted,

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⁶ In *United States v. Wheeler*, 149 F. Supp. 445 (W.D. Pa. 1957), reversed on other grounds, 256 F. 2d 745 (3d Cir. 1958), which was cited in the opinion of this Court, the District Court found as a fact that a lawyer, conversant with his constitutional rights, had nevertheless been tricked into giving his consent to an IRS search.

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JOINT APPENDIX

96)

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 11 1971

IN THE *Nathan J. Paulson*
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,198

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UNITED STATES OF AMERICA, *Appellee*,

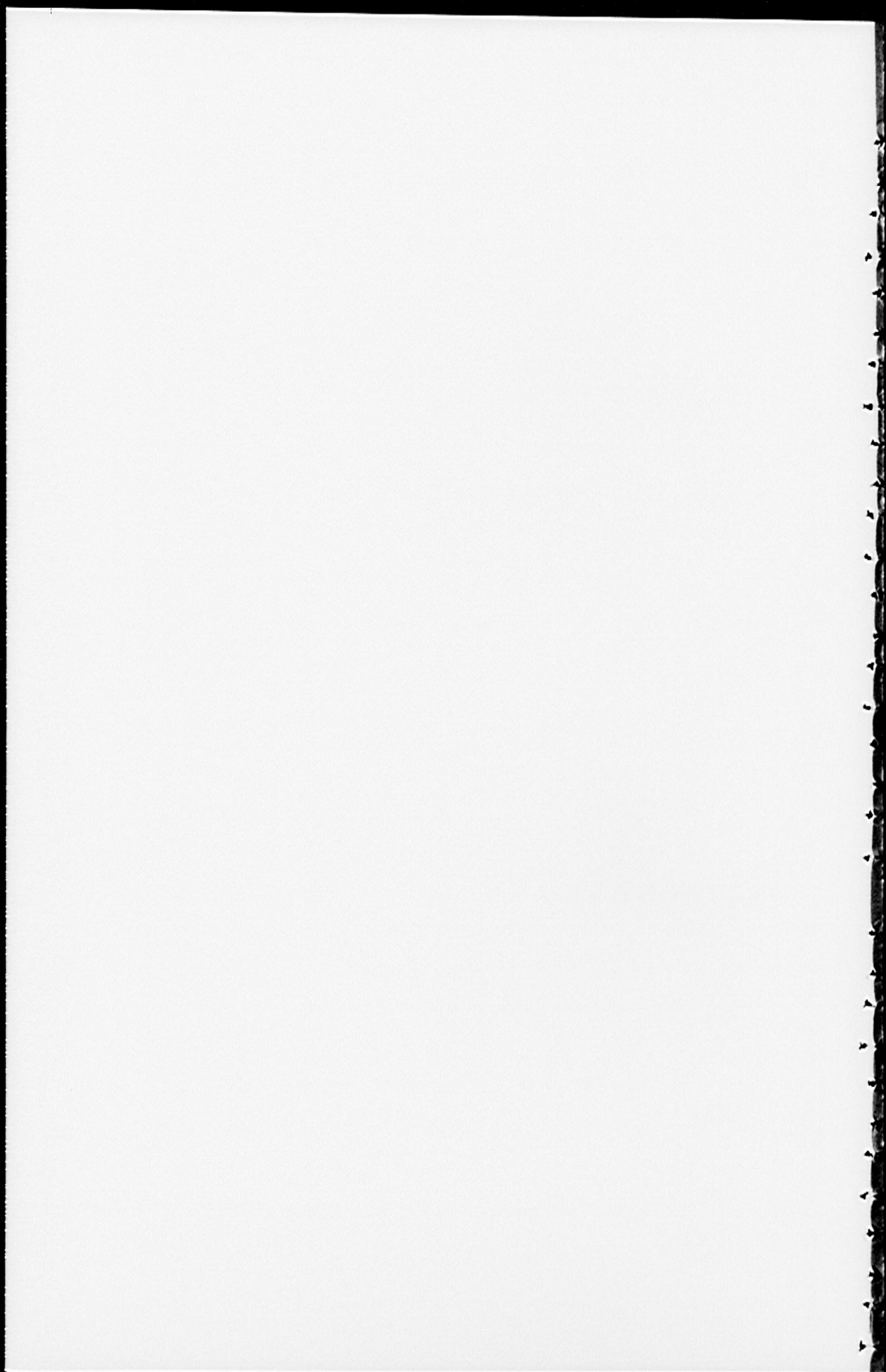
v.

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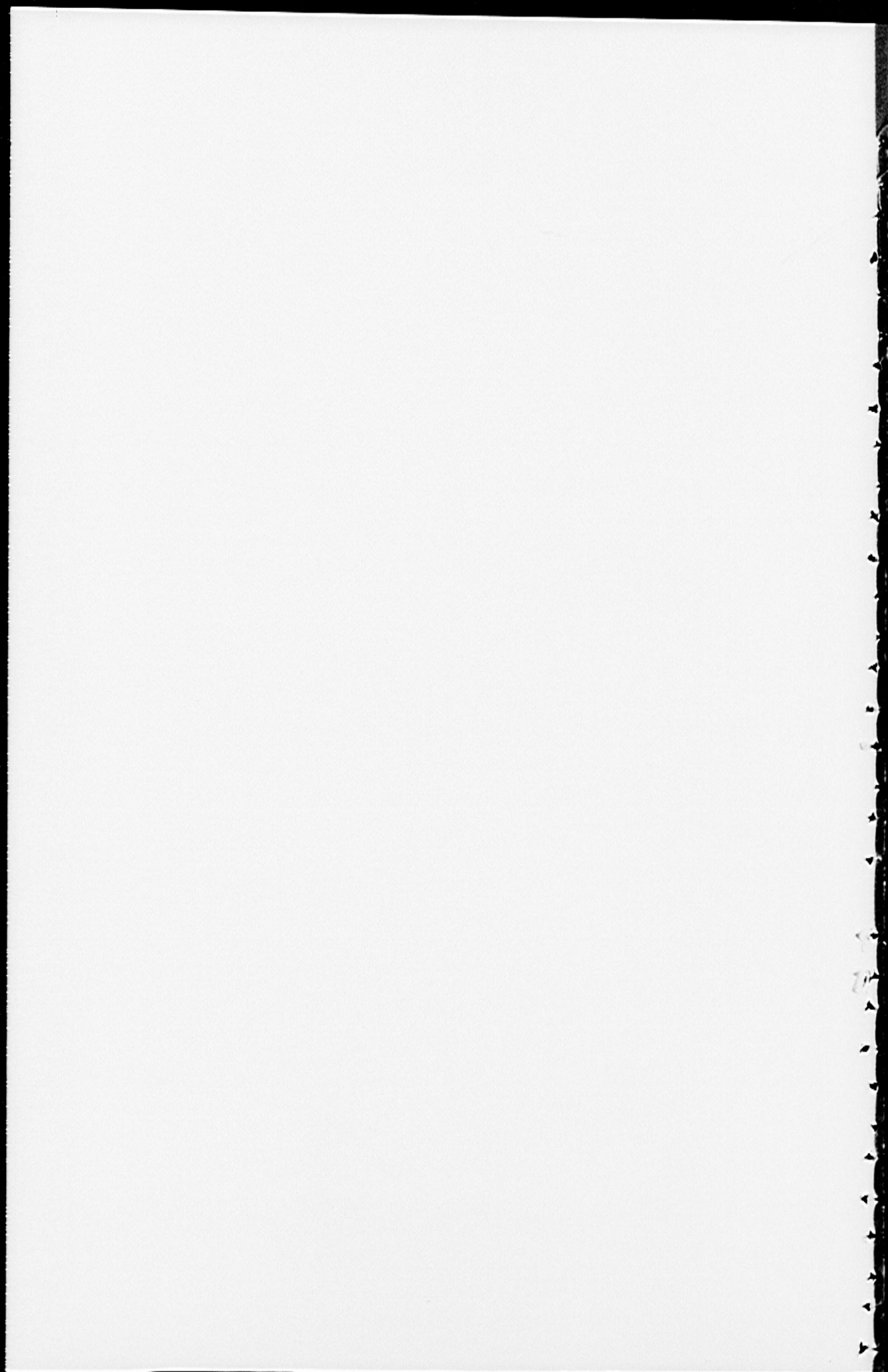
Appeal from the United States District Court for the
District of Columbia

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,198

UNITED STATES OF AMERICA, *Appellee*,

v.

WALTER R. REYNOLDS, *Appellant*.

Appeal from the United States District Court for the
District of Columbia

JOINT APPENDIX

1. Relevant Docket Entries

Criminal No. 1208-67

UNITED STATES

v.

1. WALTER R. REYNOLDS
2. BERTRAM G. DIENELT, JR.
3. HARLAN E. FREEMAN
4. R. MARBURY STAMP
5. A. CLAIBORNE LEIGH
6. E. NEIL ROGERS

1967

Sept. 22—Presentment and Indictment filed (13 Counts).

Nov. 29—No. 1: Defendants motion to dismiss indictment for want of timely prosecution; Affidavit of defendant; affidavit of George Steele; memo in support of motion; filed Cert. of service. Defendants motion to suppress evidence; affidavit of George Steele; memorandum in support of motion and Exhibit 1; filed Cert. of Service. Defendant's motion to dismiss indictment for illegal swearing of Grand Jury witnesses to secrecy; affidavit of defendant; affidavit of George Steele; affidavit of Walter E. Dillon, Jr., memo in support of motion; filed Cert. of service. Defendant's motion for bill of particulars; P&A. filed Cert. of service. Defendant's motion for discovery and inspection; P&A. filed Cert. of Service. Defendants joinder in motion of defendant #6 to dismiss Count 1 of indictment as being duplicitous and motion to consolidate Counts and to dismiss; filed Cert. of Service. Defendants motion for a severance as to defendant #3; affidavit of defendant; affidavit of George Steele; Memo in support of motion. filed. Cert. of Service.

1968

Feb. 2—No. 1: Government's answer to defendant's motions. c/s filed.

Feb. 13—No. 1: Order assigning case to Judge Aubrey E. Robinson for all purposes and directing Clerk to forward all matters to him. SIRICA, J. . . .

April 18—No. 1, 2, 3, 4, 5, 6: Order denying motions to adopt motions of other defendants, filed (N) ROBINSON, J.

June 4—1, 2, 3, 4, 5, 6: Hearing on motions to discover, suppress and dismiss begun and continued to 6-5-68

June 5—Hearing on motions resumed; taken under advisement. ROBINSON, J. . . .

Aug. 5—1, 2: Mo of deft to dismiss joined by all defts on grounds of improper G.J. procedures heard and denied. . . .

1 thru 6: Mo for discovery & inspection heard and all counsel satisfied. . . . Mo for bill of particulars heard and taken under advisement. . . .

Sept. 5—MEMORANDUM OPINION DENYING defts motion to suppress. ROBINSON, J.

Sept. 5—EACH: ORDER DENYING motion to suppress evidence. filed. ROBINSON, J. . . .

1969

Apr. 21—1, 3: Motion to dismiss indictment P&A.

Apr. 23—1, 2, 3, 6: Government's Answer to Motion to dismiss the indictment, Affidavits of Evan L. Swain and Edward Molenof. C/S.

Apr. 28—1 thru 6: Motion of all defts. to dismiss indictment for lack of indictment procedure to comply with Rule 6(f) F.R.C.P. argued and taken under advisement. ROBINSON, J. . . .

May 1—No. 1 & 3: Letter dated 4-29-69 and exhibit in support of motion to dismiss, filed

No. 1 thru 6: Govt's reply to defts mo to dismiss the indictment. c/s.

May 5—CASE CALLED FOR TRIAL—1, 2, 3 & 6—Oral motion of Defts. for reconsideration of motion to dismiss, heard, argued and Denied

May 2—#1 et al: MEMORANDUM AND ORDER DENYING Mo To DISMISS. (N) ROBINSON, J.

May 6—EACH: JURY AND FOUR ALTERNATE JURORS SWORN; TRIAL BEGUN

May 7—EACH: TRIAL RESUMED

May 8—EACH: TRIAL RESUMED

May 12—EACH: TRIAL RESUMED

May 13—EACH: TRIAL RESUMED

May 13—Order amending Court's Memorandum of Opinion of 9-5-68. (N) (Signed 5-12-69) ROBINSON, J.

May 15—EACH: TRIAL RESUMED

May 19—EACH: TRIAL RESUMED

May 20—EACH: JURY RETURNS Into Court to resume deliberations at 9:30 a.m.

VERDICT: Nos. 1, 3, 4, 5, & 6: Reynolds, Freeman, Stamp, Leigh & Rogers; GUILTY AS CHARGED:

No. 2: Dienelt, Jr., Not GUILTY

June 10—1: Motion for a new trial c/s Motion for a judgment of acquittal c/s Motion in arrest of judgment c/s.

Jul. 10—1. Deft's Memo of P&A in support of motion in arrest of judgment; C/S Deft's. Memo of P & A in support of motion for a new trial; C/S; Exhibits A-1, A-2 Deft's. Memo of P & A in support of mo. for judgment of acquittal; C/S Deft's. Mo for disclosure of exculpatory evidence; Affi., Memo of P & A, C/S.

Sep. 10—1, 3, 4, 5, 6: Motions in arrest of judgment, or in the alt., to dismiss indictment for lack of jurisdiction, motions for new trial, motions of judgment of acquittal and motions for disclosure of exculpatory material are heard and taken under advisement

Dec. 24—Govt: Memorandum and Order denying post-trial motions. ROBINSON, J.

1970

Jan. 5—Govts. response to mo of deft. FREEMAN and REYNOLDS for disclosure of exculpatory evidence. c/s.

Jan. 12—1, 3: Order denying mo for disclosure of exculpatory evidence. (N) ROBINSON, J. . . .

Jan. 27—1: SENTENCED: Twenty (20) Months to Five (5) Years on Count 1; serve six (6) Months; Bal. suspended; Probation two (2) Years; Count 2-13, I.S.S., Two (2) Years probation; Probation to follow sentence in Count 1; Bond pending appeal.

1: JUDGMENT AND COMMITMENT & Probation, filed

Feb. 4—1: Notice of Appeal from sentence of 1-27-70

2. Indictment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOLDING A CRIMINAL TERM

GRAND JURY SWORN IN ON MARCH 1, 1967

CR. No. 1208-67

GRAND JURY ORIGINAL

Violation: 18 U.S.C. 371

22-1301 D.C. Code

22-1401 D.C. Code

UNITED STATES OF AMERICA

v.

WALTER R. REYNOLDS, BERTRAM G. DIENELT, JR., HARLAN E.
FREEMAN, R. MARBURY STAMP, A. CLAIBORNE LEIGH,
E. NEIL ROGERS, *Defendants.*

THE GRAND JURY CHARGES:

COUNT I.

1. From on or about May 24, 1962, to and including on or about November 26, 1963, in the District of Columbia, and elsewhere, the defendant Walter R. Reynolds, and the defendants Bertram G. Dienelt, Jr., Harlan E. Freeman, R. Marbury Stamp, A. Claiborne Leigh, and E. Neil Rogers, as aiders and abettors, did unlawfully, knowingly, wilfully, conspire together, each with the other, and with divers other persons to the said Grand Jury unknown, to commit offenses against the United States of America, to wit, unlawfully to violate Sections 1301 and 1401, Title 22, D. C. Code, in knowingly and wilfully making, and causing to be made, false statements and representations, and in the uttering, and causing to be uttered, of documents wherein it was known that signatures of parties thereto were not

genuine, to the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, District of Columbia, an unincorporated association, its officers, directors, and stockholders too numerous to specify, with the intent to defraud said Association, its officers, directors, and stockholders in its consideration of loans applications in the names of persons hereinafter referred to as "purported purchasers" and/or "applicants for loans," on the following real estate properties, in total amount approximating Six hundred seven thousand dollars (\$607,000.00):

1. Lot 178, Section 2, Potomac Hills Subdivision
4406 Hardy Drive, McLean, Virginia
2. Lot 78, Section 2, Potomac Hills Subdivision
4807 Loch Raven Drive, McLean, Virginia
3. Lot 94, Section 2, Potomac Hills Subdivision
4816 Cola Drive, McLean, Virginia
4. Lot 100, Section 2, Potomac Hills Subdivision
4804 Cola Drive, McLean, Virginia
5. Lot 93, Section 2, Potomac Hills Subdivision
4818 Cola Drive, McLean, Virginia
6. Lot 213, Section 6, Potomac Hills Subdivision
4814 Colleen Lane, McLean, Virginia
7. Lot 91, Section 2, Potomac Hills Subdivision
4822 Cola Drive, McLean, Virginia
8. Lot 95, Section 2, Potomac Hills Subdivision
4814 Cola Drive, McLean, Virginia
9. Lot 177, Section 2, Potomac Hills Subdivision
4404 Hardy Drive, McLean, Virginia
10. Lot 36, Section 1, Potomac Hills Subdivision
4704 Loch Raven Drive, McLean, Virginia
11. Lot 64, Section 2, Potomac Hills Subdivision
4405 Hardy Drive, McLean, Virginia

12. Lot 48, Section 6, Potomac Hills Subdivision
4503 Hardy Drive, McLean, Virginia
13. Lot 98, Section 2, Potomac Hills Subdivision
4808 Cola Drive, McLean, Virginia
14. Lot 80, Section 2, Potomac Hills Subdivision
4811 Loch Raven Drive, McLean, Virginia
15. Lot 140, Section 2, Potomac Hills Subdivision
4803 Cola Drive, McLean, Virginia
16. Lot 33, Section 1, Potomac Hills Subdivision
4603 Hardy Drive, McLean, Virginia
17. Lot 176, Section 2, Potomac Hills Subdivision
4402 Hardy Drive, McLean, Virginia

It is further charged that during the year 1962, defendant Walter R. Reynolds, the president and owner of the Reynolds Construction Corporation, organized under the laws of Virginia, was engaged in the building and sales of homes in Virginia; that said defendant and the said Reynolds Construction Corporation was then operating at a loss, and was in need of operating capital; that said Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, District of Columbia, held substantial mortgages on the above specified properties owned by defendant Walter R. Reynolds and the Reynolds Construction Corporation, occasioned by loans extended for construction of said properties.

It is further charged that in order to obtain said operating capital, the defendant Walter R. Reynolds, aided and abetted by defendants E. Neil Rogers, Bertram G. Dienelt, Jr., A. Claiborne Leigh, Harlan E. Freeman, and R. Marbury Stamp would submit to, and would cause to be submitted to, said Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, in the District of Columbia, for the purpose of influencing said

Association, its officers, directors, and stockholders, in rendering favorable consideration of said loans applications, and with intent to fraudulently obtain the loans monies thereon, the following documents originating with each of the above properties and purportedly from and on behalf of each "purported purchaser" and "applicant for loan":

- a. Sales Contract
- b. Application for Loan
- c. Credit Statement
- d. Settlement Statement
- e. Deed of Trust
- f. Application for Membership, also, and hereinafter, referred to as Signature card.

In furtherance of said conspiracy, the defendants prepared, executed, and submitted, and caused to be so prepared, executed, and submitted, to the aforesaid Eastern Savings and Loan Association, also known as Eastern Building and Loan Association, in the District of Columbia, with the intent to defraud said Association, its officers, directors, and stockholders, in securing of favorable consideration thereof, sales contracts, purportedly conditioned upon the obtaining of loans to secure the purchases of the properties herein referred to, knowingly containing false statements, matter, information, and representations concerning sales of the properties hereinbefore set forth to "purported purchasers," and whose names and identities were used, some through prearrangement by the defendants with said "purported purchasers" in return for a monetary consideration, with the remaining names and identities of "purported purchasers" being utilized by the defendants without the knowledge, consent, and authority of said "purported purchasers"; that said sales contracts were knowingly to said defendants not bona fide, and did

not represent bona fide sales contracts to the "purported purchasers," in that there was no intent on part of purported purchasers and applicants for loan to secure to themselves said loans on the aforesaid property for purpose of personally acquiring the same, nor was there any intent on part of the purported seller to convey said property and possession thereof under the terms of the sales contracts; that signatures of purported purchasers and applicants for loans were knowingly not genuine; that purported purchasers and applicants for loans had no knowledge of, or interest in, transactions involved therein; that the submission of said false documents, statements, and representations by the defendants to the aforementioned Association in the name of, and purportedly in behalf of purported purchasers and applicants for loan were without the knowledge of, and not authorized by purported purchasers and applicants for loan.

It was a further part of said conspiracy that the defendants would and did submit, and did cause to have been submitted, to Eastern Savings and Loan Association, also known as Eastern Building and Loan Association, in the District of Columbia, as to each of the aforementioned properties, and in the name of each "purported purchaser" and with intent to defraud said Association, its officers, directors, and stockholders, an Application for Loan, and a Credit Statement, knowingly containing and presenting false statements, matter, information, and representations concerning the financial standing of the "purported purchaser" and "applicant for loan"; concealment of, and misrepresentations as to the true nature and character of the transactions, and in the false stating and representing that the Applications for Loans, and the Credit Statements were bona fide, and did represent bona fide transactions, in that there was no intent on part of purported purchasers and applicants for loan to secure to themselves said loans on the aforesaid property for pur-

pose of personally acquiring the same, nor was there any intent on part of the purported seller to convey said property and possession thereof under the terms of the Sales Contracts; that signatures of purported purchasers and applicants for loans were knowingly not genuine; that purported purchasers and applicants for loans had no knowledge of, or interest in, the said transactions involved herein; that the submission of false documents and statements and representations by the defendants to the aforementioned Association in the name of and purportedly in behalf of purported purchasers and applicants for loan were without the knowledge of, and not authorized by, purported purchasers and applicants for loan.

It was a further part of said conspiracy that the defendants would and did cause said Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, District of Columbia, in consideration of the aforementioned purported sales contracts, applications for loans, and credit statements, and in further consideration of the loans requests, to forward to, and request of, said defendants for execution by, and on behalf of, said "purported purchasers" and "applicants for loans," certain usual documents, specifically deeds of trust, signature cards, and settlement sheets, and that it was a further part of said conspiracy that the defendants would and did submit, and so caused to have been submitted, to said Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, in the District of Columbia, as to each property hereinbefore set forth and as to each "purported purchaser" and "applicant for loan", the executed signature card, deed of trust, and settlement sheet, each with intent to defraud said Association, its officers, directors, and stockholders, in the securing of favorable consideration of said documents, and granting of loans thereon, knowing the same to have contained, and to have presented, false statements, matter, information and rep-

representations concernig the submission of signatures of "purported purchasers" and "applicants for loans" which were knowingly not genuine; concealment of, and misrepresentation as to the true nature and character of the transaction; and in the false representations that said documents were bona fide, and represented bona fide transactions, in that there was no intent on part of purported purchasers and applicants for loan to secure to themselves said loans on the aforesaid properties for purpose of personally acquiring the same, nor was there any intent on part of the purported seller to convey said properties and possession thereof under the terms of the Sales Contracts; that signatures of purported purchasers and applicants for loans were knowingly not genuine; that purported purchasers and applicants for loans had no knowledge of, or interest in, the said transactions involved herein; that the submission of false statements, representations, and documents by the defendants to the aforementioned Association in the name of, and purportedly in behalf of purported purchasers and applicants for loan were without the knowledge of, and not authorized by purported purchasers and applicants for loan.

It is further charged that it was a part of said conspiracy that the aforementioned Association, its officers, directors, and stockholders would, and did, in reliance of the false representations and statements heretofore alleged approve the granting of said loans applied for on the aforementioned properties, and that said defendant Walter R. Reynolds, aided and abetted by defendants Bertram G. Dienelt, Jr., Harlan E. Freeman, R. Marbury Stamp, A. Claiborne Leigh, and E. Neil Rogers would, and did obtain monies represented by the said applied for loans in total amount approximating Six hundred seven thousand dollars (\$607,000.00).

The Grand Jury charges that in furtherance of said conspiracy and to accomplish its purposes and objectives, the

defendants did commit, among others the following overt acts:

a. On or about August 21, 1963, defendant A. Claiborne Leigh submitted a letter to Eastern Savings and Loan Association, in the District of Columbia.

b. On or about November 6, 1962, defendant E. Neil Rogers submitted a letter to Eastern Building and Loan Association, in the District of Columbia.

c. On or about December 11, 1962, defendant E. Neil Rogers submitted a letter to Eastern Building and Loan Association, in the District of Columbia.

d. On or about July 25, 1963, defendant Walter R. Reynolds forwarded a letter to Defendant R. Marbury Stamp in Arlington, Virginia.

e. On or about November 6, 1962, the defendants caused a letter to be sent by Eastern Building and Loan Association, in the District of Columbia, to defendant E. Neil Rogers.

f. On or about February 20, 1963, the defendants caused a letter to be sent from the Eastern Savings and Loan Association, in the District of Columbia, in care of A. Marbury Stamp.

g. On or about August 13, 1962, the defendant Bertram G. Dienelt, Jr., caused a Sales Contract, Application for Loan, and a Credit Statement to be submitted to Eastern Building and Loan Association, in the District of Columbia.

h. On or about May 24, 1962, an Application for Loan was prepared in the office of R. Marbury Stamp, in Arlington, Virginia.

i. On or about November 26, 1963, a Deed of Trust was submitted to Eastern Savings and Loan Association, in the District of Columbia, by defendant A. Claiborne Leigh.

j. On or about July 18, 1962, defendant Walter R. Reynolds affixed his signature to a Sales Contract, in Arlington, Virginia.

k. On or about October 26, 1962, defendant A. Claiborne Leigh, in McLean, Virginia, affixed his signature to a Settlement Sheet.

l. On or about July 18, 1962, defendant Bertram G. Dielnelt, Jr. caused Paul R. Rees to affix his signature to a Sales Contract in Arlington, Virginia.

m. On or about February 7, 1963, defendant Harlan E. Freeman caused an application for Loan to be submitted to Eastern Building and Loan Association, in the District of Columbia.

n. On or about October 18, 1962, defendant Harlan E. Freeman caused an Application for Loan to be submitted to Eastern Building and Loan Association, in the District of Columbia.

All in violation of Section 371, Title 18, United States Code.

COUNT II.

That on or about October 19, 1962, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-five Thousand dollars (\$35,000.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement

4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association, its officers, directors, and stockholders that one Franklin R. Chesley, Jr. was the purchaser of property known as Lot 48, Section 6, Potomac Hills, Fairfax County, Virginia, 4503 Hardy Drive, McLean, Virginia, and that said purchaser Franklin R. Chesley, Jr. and Loretta A. Chesley were applicants for loan thereon in the amount of Thirty-five thousand dollars (\$35,000.00); that said representations were not true; that the aforesaid defendants well knew the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

COUNT III.

That on or about October 19, 1962, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-five thousand dollars (\$35,000.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement
4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association, its officers, directors, and stockholders that John J. Boesel and Mary N. Boesel were the purchasers of property known as Lot 93, Section 2, Potomac Hills, 4818 Cola Drive, McLean, Virginia and that said purchasers were applicants for loan thereon in the amount of Thirty-five thousand dollars (\$35,000.00); that said representations were not true; that the aforesaid defendants well knew the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

COUNT IV.

That on or about November 1, 1962, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-seven thousand, five hundred dollars (\$37,500.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement
4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association, its officers, directors, and stockholders that one Ralph E. Swartz was the purchaser of property known as

Lot 78, Section 2, Potomac Hills, Fairfax County, McLean, Virginia; 4807 Loch Raven Drive, McLean, Virginia, and that said purchaser Ralph E. Swartz and Ruth Z. Swartz were applicants for loan thereon in the amount of Thirty-seven thousand, five hundred dollars (\$37,500.00); that said representations were not true; that the aforesaid defendants well knew the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

COUNT V.

That on or about November 1, 1962, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-five thousand dollars (\$35,000.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement
4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association, its officers, directors, and stockholders that one Byron J. Hayes, Jr. was the purchaser of property known as Lot 94, Section 2, Potomac Hills, Fairfax County, Virginia, 4816 Cola Drive, McLean, Virginia and that said purchaser Byron J. Hayes, Jr. and Nancy B. Hayes were appli-

cants for loan thereon in the amount of Thirty-five thousand dollars (\$35,000.00); that said representations were not true; that the aforesaid defendants well knew the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

COUNT VI.

That on or about November 1, 1962, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-five thousand dollars (\$35,000.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement
4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association, its officers, directors, and stockholders that one Richard T. Lyons was the purchaser of property known as Lot 100, Section 2, Potomac Hills Subdivision, Fairfax County, Virginia, 4804 Cola Drive, McLean, Virginia, and that said purchaser Richard T. Lyons and Ann C. Lyons were applicants for loan thereon in the amount of Thirty-five thousand dollars (\$35,000.00); that said representations were not true; that the aforesaid defendants well knew the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

COUNT VII.

That on or about November 8, 1962, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-five thousand dollars (\$35,000.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement
4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association, its officers, directors, and stockholders that one Joseph I. Gurfein was the purchaser of property known as Lot 178, Section 2, Potomac Hills, Fairfax County, Virginia; 4406 Hardy Drive, McLean, Virginia and that said purchaser Joseph I. Gurfein and Sarah G. Gurfein were applicants for loan thereon in the amount of Thirty-five thousand dollars (\$35,000.00); that said representations were not true; that the aforesaid defendants well know the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

COUNT VIII.

That on or about November 21, 1962, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-five thousand dollars (\$35,000.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement
4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association its officers, directors, and stockholders that Phillip G. Hammer and Joan I. Hammer, were purchasers of property known as Lot 213, Section 6, Potomac Hills Subdivision, Fairfax County, Virginia; 4814 Colleen Lane, McLean, Virginia, and that said purchasers were applicants for loan thereon in the amount of Thirty-five thousand dollars (\$35,000.00); that said representations were not true; that the aforesaid defendants well knew the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

COUNT IX.

That on or about November 28, 1962, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-five thousand dollars (\$35,000.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement
4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association, its officers, directors, and stockholders that one Robert Oppenlander, Jr. was the purchaser of property known as Lot 91, Section 2, Potomac Hills, Fairfax County, Virginia; 4822 Cola Drive, McLean, Virginia, and that said purchaser Robert Oppenlander, Jr. and Vera A. Oppenlander were applicants for loan thereon in the amount of Thirty-five thousand dollars (\$35,000.00); that said representations were not true; that the aforesaid defendants well knew the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

COUNT X.

That on or about November 28, 1962, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-five thousand dollars (\$35,000.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement
4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association, its officers, directors, and stockholders that one B. Torrey MacIlveen was the purchaser of property known as Lot 95, Section 2, Potomac Hills, Fairfax County, Virginia; 4814 Cola Drive, McLean, Virginia and that said purchaser B. Torrey MacIlveen and Eileen E. MacIlveen were applicants for loan thereon in the amount of Thirty-five thousand dollars (\$35,000.00); that said representations were not true; that the aforesaid defendants well knew the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

COUNT XI.

That on or about January 11, 1963, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-seven thousand, five hundred dollars (\$37,500.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement
4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association, its officers, directors, and stockholders that one William R. Berry was the purchaser of property known as Lot 177, Section 2, Potomac Hills, Fairfax County, Virginia; 4404 Hardy Drive, McLean, Virginia, and that said purchaser William R. Berry and Alicia Q. Berry were applicants for loans thereon in the amount of Thirty-seven thousand, five hundred dollars (\$37,500.00); that said representations were not true; that the aforesaid defendants well knew the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

COUNT XII.

That on or about March 6, 1963, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-five thousand dollars (\$35,000.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement
4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association, its officers, directors, and stockholders that one Peter Viek was the purchaser of property known as Lot 86, Section I, Potomac Hills, Fairfax County, Virginia; 4704 Loch Raven Drive, McLean, Virginia, and that said purchaser Peter Viek and Susan Viek were applicants for loan thereon in the amount of Thirty-five thousand dollars (\$35,000.00); that said representations were not true; that the aforesaid defendants well knew the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

COUNT XIII.

That on or about August 27, 1963, the defendant, Walter R. Reynolds, aided and abetted by defendants A. Claiborne Leigh, E. Neil Rogers, Harlan E. Freeman, and R. Marbury Stamp, obtained, and caused to have been obtained, monies in the amount of Thirty-five thousand dollars (\$35,000.00), from the Eastern Savings and Loan Association, also known as the Eastern Building and Loan Association, an unincorporated association, its officers, directors, and stockholders, in the District of Columbia, in reliance on representations contained in certain documents submitted by the aforesaid defendants, to wit:

1. Sales Contract
2. Application for Loan
3. Credit Statement
4. Settlement Statement
5. Deed of Trust
6. Application for Membership

wherein it was, with intent to defraud, represented to said Association, its officers, directors, and stockholders that one H. Gilbert Schachtschneider was the purchaser of property known as Lot 64, Section 2, Potomac Hills, Fairfax County, Virginia; 4405 Hardy Drive, McLean, Virginia and that said purchaser H. Gilbert Schachtschneider and Caroline M. Schachtschneider were applicants for loan thereon in the amount of Thirty-five thousand dollars (\$35,000.00); that said representations were not true; that the aforesaid defendants well knew the same to be false.

In violation of Section 1301, Title 22, D. C. Code.

A True Bill

.....
United States Attorney

.....
Foreman

3. Trial Appearances:

EDWARD MOLENOF, ESQUIRE
BRUCE A. BURNS, ESQUIRE
Department of Justice
For the Government

WALTER E. DILLON, JR., ESQUIRE
For Defendant Reynolds

ALBERT J. AHEEN, JR., ESQUIRE
For Defendant Dienelt

LESTER M. BRIDGEMAN, ESQUIRE
For Defendant Freeman

STANLEY M. DIETZ, ESQUIRE
For Defendant Stamp

LEROY E. BATCHELOR, ESQUIRE
For Defendant Leigh

FARLEY W. WARNER, ESQUIRE
For Defendant Rogers

4. Selected Transcript of Pretrial Proceedings, June 4-5, 1968

[RT 4]

George R. Steele

was called as a witness by Defendant Reynolds, and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dillon:

Q. Would you state your full name and address, please?

A. George W. Steele, 2821 Marshal Street, Falls Church, Virginia.

Q. What is your occupation, Mr. Steele? A. I am an accountant.

Q. What is your educational background? A. I am a graduate of Strayer College for Accountancy in 1957 and have been an accountant, practicing accountant since then.

Q. Where have you worked since graduating from Strayer? A. Prior to graduation, since 19—from 1956 to 1962 I was employed by a CPA in public accounting.

In 1962 I worked for Walter R. Reynolds as an [RT 5] accountant.

* * * * *

[RT 6] **By Mr. Dillon:**

Q. Now, Mr. Steele, would you describe in general your employment experience after graduating from Strayer?

A. I was employed by CPA's in public accounting up until October, 1962.

Q. In connection with your work prior to October, 1962, did you have the opportunity to engage in audits of clients of the firms you represented by Internal Revenue? A. Yes, sir.

Q. Did you deal with Revenue Agents? A. Yes, sir.

Q. Did you ever deal with Special Agents? A. No, sir.

[RT 7] Q. Did you know the difference between a Special Agent and a Revenue Agent? A. Yes, sir.

Q. Could you state the difference for the Court—your understanding? A. Well, a regular Agent conducts a civil

audit. A Special Agent conducts a criminal fraud audit.

Q. After October, 1962, or commencing in October, 1962, where were you employed? A. By Reynolds Construction Corporation in Arlington, Virginia.

Q. In what capacity? A. As Secretary-Treasurer.

Q. Who was the president of Reynolds Construction Company? A. Walter R. Reynolds.

Q. He is one of the defendants in this action? A. Yes, sir.

Q. What were your duties with Reynolds Construction Company? A. Primarily I was the accountant and was in charge of [RT 8] all the corporate accounting records.

Q. Were you an officer of the corporation? A. Yes, sir. I was Secretary-Treasurer.

Q. In your capacity as Secretary-Treasurer, did you have custody of the books of the corporation? A. Yes, sir.

Q. Were you familiar with the books of that corporation? A. I was.

Q. Have you had an opportunity to read the indictment in this case? A. Yes, sir.

Q. I hand you a copy of that indictment and I ask you to look at page two of that indictment.

I ask are you familiar with the 17 transactions that are referred to on that second page? A. I am.

Q. Are you familiar with the records pertaining to those transactions? A. I am.

Q. Did there come a time when a communication was made [RT 9] to you or to anyone in Reynolds Construction Company by a representative of the Internal Revenue Service? A. Yes, sir.

Q. Do you recall when that was? A. In March, 1964.

Q. What form did that communication take? A. A telephone conversation.

Q. Who was the one who made the telephone call? A. Michael Evangelist.

Q. What, if anything, did Mr. Evangelist say to you and what did you say to him? A. He stated that he wanted to make an appointment with me to come in and start an audit of tax returns.

Q. Did he tell you for what years? A. 1961 and 1962, as I recall.

Q. Did he tell you anything else? A. No, sir.

Q. What did you say to him? A. Well, as we were in the process of moving our accounting records at that time I asked him if he could hold off for a couple of days to give us time to get settled on [RT 10] the second floor of the building where we were.

Q. What did he say to you? A. He was insistent that he wanted to begin immediately so I told him to come on in, if our moving around wouldn't affect him, it wouldn't affect us.

Q. Did he in fact appear at the office of Reynolds Construction Company? A. He did.

Q. When was that? A. A day or two of the telephone conversation.

Q. What transpired then? A. He introduced himself, showed his credentials, asked for the books and records.

Q. Did you look at the credentials? A. Yes, sir.

Q. What did you learn from the credentials? A. That his name was Michael J. Evangelist and he was an Internal Revenue Agent.

Q. What did he say to you? A. He asked for the books and records after introducing himself. He asked for the books and records and—

[RT 11] Q. Did you give him the books and records? A. I gave him the books and records.

Q. Did Mr. Evangelist have a copy of the tax returns of Reynolds Construction Company with him? A. No, sir, he did not. As a matter of fact he asked me for our copy of the tax returns.

Q. What did you say to him? A. I told him it was unusual and asked him why he didn't have a copy and he stated that he was unable to get a copy from Richmond yet.

Q. Did you then give him the office copy of the returns? A. I gave him the office copy of our returns.

Q. What happened next? A. He started his audit.

Q. How long was he in the office of Reynolds Construction Company? A. Well—

Q. Let's start with the first date. A. I would say—

Q. Let's start with the first day, Mr. Steele. A. With the first day?

[RT 12] Q. Yes. A. The first day he was there probably five or six hours.

Q. Where was he working? A. In our office, in the accounting office. He worked right in the accounting office.

Q. In other words, in the same room as you? A. In the same room with me, yes.

Q. Drawing your attention to the items referred to in the indictment on page two, which you saw before, did there come a time when Mr. Evangelist asked you questions regarding those transactions? A. Yes, sir.

Q. When was that? A. Well, either the first or second day in there—either the first or second day after he started his audit.

Q. Do you recall in general what his questions were and what your answers were? A. Well, he pointed to a particular transaction in the books, in the journals, and asked me to explain the transaction to him, and I explained the transaction to him.

Q. Do you recall your explanation of the transactions? [RT 13] A. Yes.

I explained that this was a refinance transaction, a straw arrangement, and this was entered in the accounting records along with everything else.

Q. Did Mr. Evangelist ask to copy any of these records you were showing him? A. I am sorry. I didn't hear you.

Q. Did Mr. Evangelist ask to copy or to photostat any of the records that you were showing him? A. Oh, yes, yes.

Q. Did he do so? A. Yes, sir.

Q. Did he do so on the premises? A. Yes, sir.

Q. Do you recall which documents— A. No—

Q. —he photostated? A. —I don't recall. There were numerous documents that he photostated right on the

premises—carbon copies of some documents were furnished to him.

* * * * *

[RT 14] Q. Now, Mr. Steele, I hand you a paper document and ask if you can identify it? A. Yes, sir.

Q. Would you please identify it? A. That is a receipt given me by Mr. Evangelist on account of these various refinance transactions, the lot numbers, same lots that are listed there.

Mr. Dillon: I ask Your Honor that this be marked Defendant Reynolds' Motion Exhibit No. 1, for identification.

The Court: It may be marked.

The Deputy Clerk: Defendant Reynolds' Exhibit No. 1 marked for identification.

(Defendant Reynolds' Exhibit No. 1 marked for identification.)

By Mr. Dillon:

Q. I hand you this document and I ask you to tell the [RT 15] Court what that document is. A. Well, this—do you want me to read from it?

It is a receipt for sales contracts and has a list of lots and settlement statements—and it has a list of lots of the settlement statements.

Now these are either photostats or carbon copies.

Dated March 31, 1964, and signed by Mr. Evangelist.

Q. The top of the document is printed. Whose writing is that? A. That is my writing.

Q. The document is signed by Michael Evangelist. Did he sign that in your presence? A. Yes, sir, he did, as I recall.

Q. Did he take the documents out of the office at that time? A. He did.

Mr. Dillon: We would like to submit this in evidence as Defendant Reynolds' Motion Exhibit No. 1.

The Court: Is there any objection, Mr. Molenof?

Mr. Dillon: Any objection? I am submitting it in evidence.

[RT 16] Mr. Molenof: I don't know. I haven't seen it. You haven't shown it to me yet.

(Mr. Molenof examines paper.)

These are pertaining to—you were talking about 17 and these pertain to 15 transactions.

Mr. Dillon: Yes, I am going to have them identified. Any objection?

Mr. Molenof: With respect to the 15 transactions there is no objection.

Mr. Dillon: With respect to the introduction of the document is there any objection?

Mr. Molenof: With respect to the document itself there is no objection.

The Court: Then the document will be admitted.

The Deputy Clerk: Defendant Reynolds' Exhibit No. 1 received into evidence.

(Defendant Reynolds' Exhibit No. 1 received in evidence.)

By Mr. Dillon:

Q. Mr. Steele, you have testified that you have read the indictment and that you are familiar with the document that [RT 17] has just been submitted in evidence.

I ask you to look at page two of the indictment and at this Exhibit 1 and tell the Court how many of the lot transactions that appear on the indictment, page two, appear on this document Exhibit 1. A. (Examining.)

I believe it is 15, 15 of these 17.

Q. Now, does Lot 99— A. No, Lot 99 is not on there.

Q. So your testimony then is that 14 of the 17 transactions— A. Fourteen, right.

Q. —appear on both the indictment and Exhibit 1? A. Right.

Q. With reference to the sales contract you have testified you were well acquainted with the sales contracts and the settlement statements.

Were there references on the settlement statements to straw services? A. Yes, sir.

Q. Did you or did you not discuss that reference with [RT 18] Agent Evangelist? A. Oh, yes, definitely.

Q. Subsequent to this date, which was the second day of—you have testified it was the second day of Mr. Evangelist's visit, did you again discuss the straw transactions with him? A. Yes, sir.

Q. On more than one occasion? A. Oh, yes.

Q. On several occasions? A. Several occasions.

Q. Did there come a time when you attempted to contact Agent Evangelist? A. Yes.

Q. Had he told you what office he was working out of? A. Out of the Alexandria office.

Q. What was the result of your attempt to contact him? A. I called the Alexandria office. The purpose of my call was—he had left the office for a day and was coming back the following day, and something came up I didn't want him in the office.

[RT 19] I called the Alexandria office to ask him to not come back that day and no one in the Alexandria office ever heard of the man.

I think I covered just about every area of the Alexandria office and no one had ever heard of the man.

So at this time I became quite alarmed. I didn't quite know who had been going over our books and records, quite frankly.

Q. Did Agent Evangelist again appear at the office? A. The next day he came in the office.

Q. What did you do? What did you say to him and what did he say to you? A. At that time I stopped him at the top of the stairs and told him I wanted to know who he was.

He showed me his credentials again.

I explained to him my concern. I examined his credentials quite closely at this time.

I explained to him my concern and I wasn't quite satisfied yet that this—whether this man was an Internal Revenue Agent.

So at that time I asked him who he was and what he [RT 20] was doing and he said he was an Internal Revenue Agent and was conducting a routine audit of the Reynolds Construction books—of the Reynolds Construction tax returns.

Q. You say he did use the term routine? A. He did use the term routine.

Q. Did the time come when Agent Evangelist raised any objection from a tax significance point of view with regard to the straw services or with regard to expenses connected with the transactions that you have been testifying to? A. Yes. Sometime during the period of his audit he was going to disallow the deductions involved in these straw transactions.

Q. Did he tell you that he was considering disallowing them? A. He said he was considering disallowing them.

Q. Did he tell you on what basis he was considering disallowing them? A. On the basis that they were against public policy.

Q. What did you say to him? A. Well, quite frankly, I laughed.

Q. Did you say anything to him? [RT 21] A. Well, I told him I certainly didn't agree with this, that possibly he could question our ethics in the transaction but he couldn't question our honesty.

Q. Did he in fact disallow the expenses? A. No, he did not disallow the expenses.

Q. He in fact allowed them as an ordinary and necessary business expense? A. He did.

Q. Now, during the course of Agent Evangelist's visits to the office of Reynolds Construction Company did he also conduct an audit of Walter Reynolds, the president, and Mrs. Reynolds? A. Yes, sir.

Q. Of their personal income tax returns? A. That's right.

Q. Prior to this time or at any point subsequently did Agent Evangelist advise you or to your knowledge did he advise Walter Reynolds of his right to counsel or his right not to answer questions?

The Court: How would he know that?

Mr. Dillon: Excuse me?

[RT 22] The Court: How would he know that?

Mr. Dillon: I am asking did he advise Mr.—

The Court: Was he present at all times that the Agent talked with the defendant?

The Witness: Yes, sir, I was.

The Court: At all times?

The Witness: Yes, sir.

The Court: All right.

By Mr. Dillon:

Q. Did Agent Evangelist ever advise you or advise Mr. Reynolds— A. No.

Q. —in this respect? A. Never.

Q. Did Agent Evangelist ever indicate to you that any of the bookkeeping entries with regard to these transactions in the indictment were inaccurate in any way? A. No, sir.

Q. Did he ever question the accuracy of any of the entries? A. No, sir.

[RT 23] Q. You have already testified that he didn't even have a copy of the tax returns of Reynolds Construction Company when he came in the office. A. That's right.

Q. Did he ever during the course of the audit show you a copy? A. Never.

Q. Did he ever indicate that he had secured a copy? A. No, sir, he never did.

* * * * *

[RT 37] Cross-Examination

By Mr. Molenof:

Q. Mr. Steele, there were many—I mean, he went over all of your books and records. These aren't the only transactions that he considered.

Isn't that right? A. That's right.

Q. I mean, he considered all of your books and records. A. He did.

Q. As a matter of fact, from the year 1963 there was an approximate amount of \$44,000 tax deficiency and an approximate amount of \$11,000 in penalties assessed against the company.

Isn't that right? A. No, sir, that was not against Reynolds Construction.

Q. What was it? It was against the Walter R. Reynolds Company— A. That was a transaction of Reynolds Construction Corporation that the Agent transferred out of the Construction Corporation into a brokerage corporation.

Q. That was one of the matters he was considering, too, [RT 38] wasn't it? A. Well, that is one—that is the only change that he made on the audit over a three-year period of time, and that has not yet been resolved.

Mr. Molenof: No further questions.

Mr. Dillon: One question, Your Honor.

Redirect Examination

By Mr. Dillon:

Q. With regard to the transaction that Mr. Molenof just asked you about, when did Mr. Evangelist start asking about that transaction? A. About the second or third day in there.

Q. And he did— A. That question was raised along about the same time that he raised the question on the straw transactions.

* * * * *

[RT 39]

Michael J. Evangelist

was called as a witness by Defendant Reynolds, and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dillon:

Q. Would you state your full name, address, and occupation, please? A. My name is Michael Evangelist. I live at 413 Forest Avenue, Norristown, Pennsylvania.

I am an Internal Revenue Agent.

Q. How long have you been an Internal Revenue Agent?
A. Since February, 1960.

Q. Where have you been employed as an Agent? A.
During my career, sir?

Q. Yes. A. I have been employed in Camden, New Jersey, Alexandria, Virginia, and Philadelphia at the present time.

Q. Well, drawing your attention to the year 1962, where [RT 40] were you employed? A. I was in Camden, New Jersey, '62.

Q. Did there come a time when you were transferred to Alexandria, Virginia? A. Yes, sir.

Q. To what office? A. To what office in Alexandria, Virginia?

Q. Yes. A. To an office on Washington Street, the 300 block of Washington Street.

Q. Now, in connection with your duties, did you ever perform an audit of Reynolds Construction Corporation?
A. Yes.

Q. Do you recall when that was? A. Approximately in March of 1964.

Q. What sort of an audit was it? A. It was an examination of Mr. Reynolds' Construction Company.

Q. Was it a routine audit? A. Sir, I have never used the word routine in any audit that I do.

[RT 41] Q. All right.

There was some testimony by Mr. George Steele. Do you know Mr. George Steele? A. Yes, sir.

Q. Is he the gentleman who handled the books and records of Reynolds Construction Company during your audit? A. Yes, sir.

Q. He has just testified that when you came into Reynolds Construction Company, you did not have Mr. Reynolds' tax return.

Is that true? I mean the Reynolds Construction Company tax return.

Is that true? A. I should have had it. I most certainly had it, sir. I couldn't walk in without a return.

Q. He has testified that—let me try to refresh your memory.

He testified that when you came in you told him that—you asked to borrow his copy—in other words, the office copy of their return, and you told him that you had been unable at that time to get the Reynolds Construction [RT 42] Company return from Richmond.

Does that refresh your memory? A. No, sir.

It could have been one or two—see, there was a few years involved—and it could have been one or two years where I did not have the original return—that could be correct.

Now, which year it is, I don't know, sir.

Q. How did you receive the assignment to audit the Reynolds Construction Company books? A. It was assigned by Mr. Cole.

Q. Is that Oral Cole? A. Yes, sir.

Q. What was his position at this time? A. He was my supervisor.

Q. Could you tell us something about the group that Mr. Oral Cole supervised?

Was it a regular Internal Revenue office where, say, if I lived in Alexandria, my tax return would be audited? A. No, sir, it was not that type of office.

Q. Could you tell the Court just what that group was [RT 43] comprised of and what its function was in general? A. Well, it is my understanding that it was a group—an organized crime group, if that is what you are referring to—and it was made up of Special Agents and Internal Revenue Agents.

Q. You were assigned at what date? Approximately what date? A. I was assigned to the group?

Q. To the group. A. January, 1964.

Q. Were you briefed by Mr. Cole as to the function of that office? A. Yes, sir.

Q. Could you tell the Court what you were told about the function of that office? A. Well, the function of the

office was that we were investigating or we were investigating bribery in Fairfax County of public officials.

Q. This was your function and your function was to assist in this investigation of bribery? A. Yes, sir.

[RT 44] Q. Now, were you instructed when you went into an office to reveal the fact to the object of your audit or to the employees that you were investigating crime?

A. No, sir.

Q. But you did know when you walked into an office that your function was to investigate crime.

Mr. Molenof: May it please the Court, with respect to what? I submit crime with respect to what?

Mr. Dillon: He stated bribery. I will withdraw the question.

By Mr. Dillon:

Q. But you did know—now, you have testified that the function of that office was to investigate bribery.

My question now is did you at that time or did you advise anybody when you inspected their records, or any corporate records, or any employees of a corporation whose records you audited that you were a crime investigator investigating bribery? A. No, sir.

Q. Were you instructed not to reveal this to any of the subjects? [RT 45] A. No specific instructions, sir.

Q. Drawing your attention specifically to the Reynolds Construction Corporation, what documents did Mr. Cole give you with regard to Reynolds Construction Company prior to your auditing or beginning your audit? A. What records were made available?

Q. Yes. A. Well, he made available all the corporate records and books of original entry and the source data.

Q. Could you repeat that? I didn't hear you. A. He made available all the source documents, the books of original entry, you know, the compilation of their records and—

Q. I am talking about prior to the time you audited

Reynolds Construction Company. A. Prior to the time I audited Reynolds?

Q. Yes.

What documents regarding Reynolds Construction Company were shown to you by Mr. Cole or any other employee of that office?

Mr. Molenof: If any. Your Honor, I object. If any.
[RT 46] Mr. Dillon: If any.

The Court: Do you understand the question? He is talking about your—

The Witness: I had no records of Mr. Reynolds before I went in.

By Mr. Dillon:

Q. Did you have his tax returns? A. Yes, sir.

Q. Where did you get them? A. From Mr. Cole.

Q. They didn't come from Richmond, did they?

Mr. Molenof: Your Honor, I object. It doesn't matter. He got them from his superior.

Mr. Dillon: All right.

By Mr. Dillon:

Q. What did Mr. Cole tell you about the investigation of what you were supposed to investigate when you went into Reynolds Construction Company? A. Well, Mr. Cole was not the one who gave me any particular instructions when I went in to examine Reynolds Construction Company.
[RT 47] Q. Who was it that did give you these instructions? A. Mr. McElroy.

Q. Is that the Mr. McElroy—have you seen the indictment in this case? A. No, sir.

Q. Well, let me read from page 24 and I will ask you if the Mr. McElroy you are referring to is this Mr. McElroy.

Mr. Molenof: Are you talking about the indictment?

Mr. Dillon: The indictment.

Mr. Molenof: Page 24 of the indictment?

Mr. Dillon: I am sorry. Page 17, I believe. I am confused, Your Honor. This is Mr. Molenof's answer.

By Mr. Dillon:

Q. Is the Mr. McElroy whose name you just mentioned the Mr. McElroy, Kenneth McElroy, Intelligence Division, Internal Revenue Service, Richmond, Virginia? A. Yes, sir.

Q. And he was also attached to this organized crime unit in Alexandria? A. Yes, sir.

Q. What did Mr. McElroy tell you with regard to this [RT 48] assignment? A. With regard to this assignment, it came to their attention somehow that Mr. Reynolds—there were allegations or they had some information or they felt that Mr. Reynolds had financial transactions with Mr. Leigh, A. Clairborne Leigh, and one of my duties was to obtain all the financial transactions between Reynolds and Leigh.

Q. Did he tell you that Mr. Leigh was suspected of having received a bribe or bribes? A. Potential was there, yes, sir.

Q. Did he tell you that Reynolds Construction Company was suspected of having paid bribes? A. Not really, but since they did have rezonings and Mr. Reynolds was involved in the controversial rezonings, there was an indication that a bribe may have been made.

Q. So that when you went to Reynolds Construction Company that was—there has been testimony that was in March of '64.

Is that your recollection? A. That is my recollection.

Q. So that when you went there you weren't sent there [RT 49] for the purpose of doing a routine audit but, rather, you were sent there to investigate the connection between Mr. Leigh and Reynolds Construction Company, specifically with regard to bribery.

Is that true? A. Sir, the word routine is not correct. I was assigned the income tax return for examination to determine the correct tax liability as usual, and in addition thereto what you just said.

Q. But your primary purpose was to investigate the connection with Mr. Leigh.

Is that true? A. Primary is very difficult—to say primary, I mean. Of course, Mr. Reynolds, I mean that is primary, too, that income tax return.

Q. Did you also do a tax audit of Harlan Freeman? A. Yes, sir.

Q. Was this audit also turned over to you by Mr. Cole? A. Well, again, with Mr. McElroy giving instructions.

Q. What did Mr. McElroy tell you about Harlan Freeman? A. Well, Harlan Freeman, we knew that he received [RT 50] approximately \$2,400 in reference to these transactions and he only reported \$1,600 on his income tax return, as I recall, and one of my duties was to determine if he had made a kickback to Mr. Leigh.

Q. So that before you went into Reynolds Construction Company, you knew or were informed that Mr. Harlan Freeman had received \$2,400 in connection with the—what I would call the straw transactions? A. I don't know if before or after, but I did know that he did receive \$2,400.

I don't know the exact date, sir.

Q. Do you recall if you discovered this—if you audited at least this part of Harlan Freeman's return before you went to Reynolds Construction Company? A. I really don't. I think it was afterwards. I think—I am not quite sure, that I examined Mr. Freeman after—maybe I was doing the construction company and, you know, was doing Freeman subsequently, and they could have run concurrently. I don't know.

Q. Did you examine any records of the law firm known as Leigh and Rogers prior to your audit of Mr. Reynolds or [RT 51] Reynolds Construction Company? A. No, sir.

Q. Were any reports made to you orally or in writing concerning the contents of those records? A. No, sir, I couldn't say. No, sir.

Q. Well, did Mr. McElroy, for example, tell you that Harlan Freeman had received from Leigh and Rogers, settlement attorneys, certain fees? A. Oh, yes, that is correct, yes.

Q. In connection with these straw transactions? A. Yes, sir.

Q. This was prior to the time you went into Reynolds Construction Company? A. Now, that I can't say for certain, but it was approximately the same time within like, say, March and July of 1964.

* * * * *

[RT 56] Q. So that your testimony is that this organized crime group in Internal Revenue had an office separate and apart from the— A. Yes.

Q. —Alexandria office. A. Yes, sir.

Q. Did you later move your office in Alexandria? A. Yes, sir.

Q. Where did the office move to? A. Bailey's Crossroads.

* * * * *

[RT 57] By Mr. Dillon:

Q. Mr. Evangelist, I hand you a document which is in evidence as Defendant Reynolds' Exhibit 1, and ask you if you recognize that document? A. Yes, sir.

Q. Is that document a receipt signed by you in the office of Reynolds Construction Corporation? A. Yes, sir.

Q. Does it acknowledge receipt of 15 sales contracts and 15 settlement statements? A. You want me to count them to make sure it is 15?

Q. Well, if I told you—go ahead. A. Well, there are receipts for sales contracts and settlement statements, yes, sir.

Mr. Molenof: Fourteen.

By Mr. Dillon:

Q. What did you do with these documents when you took them out of Reynolds Construction Corporation? A. I gave them to Mr. McElroy.

[RT 58] Q. Did you discuss them with Mr. McElroy? A. I don't know if I discussed them. I just gave them to him. If there was a discussion I don't recall what it pertained to.

Q. Let me go back a bit.

Q. But your primary purpose was to investigate the connection with Mr. Leigh.

Is that true? A. Primary is very difficult—to say primary, I mean. Of course, Mr. Reynolds, I mean that is primary, too, that income tax return.

Q. Did you also do a tax audit of Harlan Freeman? A. Yes, sir.

Q. Was this audit also turned over to you by Mr. Cole? A. Well, again, with Mr. McElroy giving instructions.

Q. What did Mr. McElroy tell you about Harlan Freeman? A. Well, Harlan Freeman, we knew that he received [RT 50] approximately \$2,400 in reference to these transactions and he only reported \$1,600 on his income tax return, as I recall, and one of my duties was to determine if he had made a kickback to Mr. Leigh.

Q. So that before you went into Reynolds Construction Company, you knew or were informed that Mr. Harlan Freeman had received \$2,400 in connection with the—what I would call the straw transactions? A. I don't know if before or after, but I did know that he did receive \$2,400.

I don't know the exact date, sir.

Q. Do you recall if you discovered this—if you audited at least this part of Harlan Freeman's return before you went to Reynolds Construction Company? A. I really don't. I think it was afterwards. I think—I am not quite sure, that I examined Mr. Freeman after—maybe I was doing the construction company and, you know, was doing Freeman subsequently, and they could have run concurrently. I don't know.

Q. Did you examine any records of the law firm known as Leigh and Rogers prior to your audit of Mr. Reynolds or [RT 51] Reynolds Construction Company? A. No, sir.

Q. Were any reports made to you orally or in writing concerning the contents of those records? A. No, sir, I couldn't say. No, sir.

Q. Well, did Mr. McElroy, for example, tell you that Harlan Freeman had received from Leigh and Rogers, settlement attorneys, certain fees? A. Oh, yes, that is correct, yes.

Q. In connection with these straw transactions? A. Yes, sir.

Q. This was prior to the time you went into Reynolds Construction Company? A. Now, that I can't say for certain, but it was approximately the same time within like, say, March and July of 1964.

* * * * *
[RT 56] Q. So that your testimony is that this organized crime group in Internal Revenue had an office separate and apart from the— A. Yes.

Q. —Alexandria office. A. Yes, sir.

Q. Did you later move your office in Alexandria? A. Yes, sir.

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Mr. Molenof: Fourteen.

By Mr. Dillon:

Q. What did you do with these documents when you took them out of Reynolds Construction Corporation? A. I gave them to Mr. McElroy.

[RT 58] Q. Did you discuss them with Mr. McElroy? A. I don't know if I discussed them. I just gave them to him. If there was a discussion I don't recall what it pertained to.

Q. Let me go back a bit.

Prior to the time you received these documents did you have conversations with George Steele with regard to these transactions related to the documents? A. Yes, sir.

Q. Did he tell you that these were straw transactions? A. I don't think he used that term. Maybe refinance charges, refinancing.

Q. You had inspected the original of these documents prior to March 31, the date on this document, in the offices of Reynolds Construction Corporation? A. I really don't recall whether I inspected the originals before this date or not—it could have been, you know, the same day—but I had to see them before I took a copy.

Q. I see.

When you gave them to Agent McElroy was this under [RT 59] his instructions? Was this something you did?

A. For Mr. McElroy, that is correct.

Q. Did the word forgery ever come up in your discussions with Agent McElroy? A. Forgery?

Not the term forgery, no, sir.

Q. Did you know or did it come to your attention during the course of your audit who signed the sales contracts referred to in Exhibit 1? A. No, sir.

Q. Did you make written reports to Agent McElroy? A. In reference to these transactions right here?

Q. Yes. A. From Reynolds Construction Company are you referring to?

Q. Yes. A. I gave Mr. McElroy—I copied off a list of all the transactions which appeared to be refinancing from Reynolds Construction Company and I did give him that work paper or it was in my case file for Reynolds Construction Company, and any other memorandum I can't think of that I [RT 60] gave him.

Q. Did these documents have any significance to your audit of Reynolds Construction Company tax returns? A. If I may digress a moment, I can tell you—

Q. I would prefer you to answer the question. A. Well, no, no.

Q. Prior to the time you went in to audit Reynolds Construction Company records had anybody indicated that there were any irregularities in Mr. Reynolds' returns or Reynolds Construction Company returns? A. The returns themselves?

Q. Yes. A. No, sir.

* * * * *

[RT 61] Q. During the course of your audit, Mr. Steele has testified that you questioned the allowance as deductions of certain expenses relating to these transactions.

Do you recall that? A. Well, that is why I wanted to digress a moment and you said No, so I said No.

Q. Well— A. The reason why a deduction was not recommended in reference to these expenses at the time was because it would not have been any tax consequence because Reynolds Construction Company at the time had an unused carryover loss, in fact, the figure comes to my mind about \$50,000—

The Court: You will have to keep your voice up.

The Witness: So any adjustment I would have made would have been of no consequence.

By Mr. Dillon:

Q. Now, Mr. Steele testified that you told him that you were considering disallowing these expenses because they were against—and I quote him—public policy.

Is this your recollection? A. That could be true, yes, sir.
[RT 62] Q. What was the basis of this judgment of yours?

Mr. Molenof: Your Honor, I object.

The Court: It is completely immaterial.

By Mr. Dillon:

Q. Did you at any time consider these transactions illegal? A. Did I consider them illegal? No.

Q. Did Mr. McElroy?

Mr. Molenof: Object.

The Court: Sustained.

By Mr. Dillon:

Q. But your testimony is that when you finally wrote up your report you didn't disallow because Reynolds had a tax carryover—Reynolds Construction Company did? A. Yes, sir.

Q. Do you recall what specific years you were auditing? A. I don't know—it was four years, I think I did '61, '2 '3, and '4.

Mr. Dillion: I have no further questions, Your Honor.

The Court: Do any other counsel have questions?

By Mr. Batchelor:

[RT 63] Q. Mr. Evangelist, did I understand you to testify that you were making an investigation of Mr. Leigh when you went to the Reynolds Construction Company?

A. I was not making an investigation of Leigh, no, sir.

Q. You were there because, as I understand your testimony, you wanted to investigate certain financial transactions which might involve Mr. Leigh? A. Yes, sir.

Q. Mr. Evangelist, would it be fair to say that when you were brought from Camden, New Jersey, to Alexandria, Virginia, you were brought there to join this special Metro project? A. Yes, sir.

Q. Was this special Metro a joint task force of the Internal Revenue Service and the Justice Department to make an investigation into Fairfax County, the officials of Fairfax County? A. Sir, I don't think I could answer that question. I don't know what the supervisor and higher echelon were doing.

* * * * *

[RT 67] Q. Now, would it be fair to say, Mr. Evangelist, from your experience in the special project, that this group or grouping of agents, of both Special Agents and Revenue Agents, functioned in this fashion, that is, you were given an assignment to go out—to audit tax returns as a Revenue Agent? A. Yes, sir.

Q. And then you would take your findings and report back to a Special Agent who was supervising the opera-

tion? A. I would report to them if I found anything, yes, sir.

Q. In this particular case your contact man for this purpose was Mr. Kenneth McElroy, was it not? A. That is correct.

Q. Now at the time that you made your investigation with regard to the Reynolds Construction Company, you were there to investigate or to obtain evidence with respect to a possible bribery in a zoning case.

Is that right?

Mr. Molenof: I object, Your Honor. I object. That wasn't his answer.

Mr. Batchelor: Well, I am asking. I am sorry.

[RT 68] Mr. Molenof: Go ahead.

By Mr. Batchelor:

Q. Were you there for that purpose? A. I was at Reynolds Construction Company to obtain all the financial transactions with Leigh.

Q. Did I understand your testimony—you correct me if I am wrong—did I understand your testimony on direct examination to be that you were there for the purpose of looking into possible payoffs to Mr. Leigh? A. That is correct.

* * * * *

[RT 89]

Kenneth E. McElroy

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Batchelor:

Q. State your name and occupation to the Court, please.
[RT 90] A. Kenneth E. McElroy, Special Agent with the Intelligence Division of the Internal Revenue Service, Richmond District, Richmond, Virginia.

* * * * *

[RT 92] Q. Prior to that period of time, Mr. McElroy, would it be fair to say that revenue agents operating within the Metro Project were given assignments of specific individuals or companies, the object being that they should go to those companies for the purpose of making an audit of their records; is that correct? A. Yes.

Q. When they made an audit of these records, did they not make copies or notes and report back to the special project and disseminate that information to special agents, yourself included, as to what their findings were as of that time? A. No, sir, I wouldn't say that that was the general practice, Mr. Batchelor. The practice was that a revenue [RT 93] agent was assigned in a case to make an audit, and at the completion of his audit or at the time that he figured that he had gone far enough, if he found what were indications of fraud—and we say indications of fraud is all he is required to find—upon finding this, he writes what is known as a Referral Report. This Referral Report is sent to the Chief of the Intelligence Division in Richmond, Virginia, and he has to make the decision as to whether there will be what is spoken of as a joint investigation. And if so, then a special agent is assigned, and the special agent assigned and the revenue agent, in most cases the same revenue agent, continues on with the investigation.

At that point the revenue agent is working under the jurisdiction of the special agent.

Q. All right, sir. Now, that is the standard operating procedure of the Internal Revenue Service in the audit of returns, is it not? A. That's the regular procedure.

Q. Now, was Metro Project organized for the purpose of conducting the ordinary routine investigation of taxpayers' returns, or was it organized for the purpose of making investigations into whether or not there was corruption among public officials in Fairfax County? [RT 94] A. It was made for both purposes.

Q. Was this revealed to you at this meeting on April 23rd of 1963 that this was a dual purpose? A. Yes. But there had been allegations of corruption and it was formed

for the purpose of determining that. But that does not mean that a special agent or anyone under the Intelligence Division immediately starts working on any of the proposed taxpayers.

Q. Mr. McElroy, isn't it true in the Metro Project that special agents and revenue agents were brought in from various parts of the country to operate as an investigative team on the question of corruption in Fairfax County; isn't that true? A. That's true.

Q. Now, let's go from there. Prior to your appearing here on the stand today, there was testimony given by one of your colleagues, Mr. Evangelist, to the effect that you had directed him or you had given him information with regard to certain specific documents in the hands or that should appear in the records of the Reynolds Construction Company.

Could you tell us, number one, did you give Mr. Evangelist instructions to look for those records? And if you did, where did you obtain the information with regard to [RT 95] those particular records? A. I didn't give Mr. Evangelist instructions because I was not his superior, but I asked him to look for them, not demanding. I wasn't his superior at that time.

Q. Mr. McElroy, without getting into the hierarchy of this organization, as a practical matter, the special agents involved in the Metro Project were more or less supervisory officers with regard to certain evidence you were looking for; isn't that right? A. I can't say that as a general statement, Mr. Batchelor. It's only if a joint investigation is going on, which was not of Mr. Reynolds, and, therefore, I could not direct his action as to Mr. Reynolds.

The only thing that I was asking him for was information between the Reynolds Construction Company and A. Clairborne Leigh.

• • • • •

[RT 99] Q. How did you come about the information in 1963 pertaining to Reynolds Construction Company and certain specific transactions, how did you come about that information? That's the question.

The Witness: I did not have any of this information which I later discussed with Mr. Evangelist. I did not have any of this information in the year 1963. None whatsoever.

The Court: Very well.

By Mr. Batchelor:

Q. Let me ask you this, Mr. McElroy: Did Agent Hansel of the Metro Project obtain certain records in June, July and August of 1963 from Mr. A. Claiborne Leigh's office which were made available to you among which included the papers in the files in connection with the transactions which are the subject of the indictment in this case? A. I don't recall ever seeing any records in the year 1963 of Mr. Leigh's.

Q. Did you ever have occasion to discuss with revenue agent Hansel any of the data which he obtained from Mr. Leigh's office in those months in 1963?

Mr. Molenof: What date do we have reference to that Mr. who obtained?

[RT 100] Mr. Batchelor: Mr. Hansel.

Mr. Molenof: What kind of data are you referring to?

Mr. Batchelor: Any kind of data relating to this matter.

Mr. Molenof: Relating to this matter.

The Witness: Relating to this case here, I have no recollection of discussing anything with him. There was some discussion of his check spread, things of that sort, which Mr. Hansel had prepared from Mr. Leigh's records. But I don't recall discussing anything at that time that relates to the case and subject.

By Mr. Batchelor:

Q. Mr. McElroy, in 1964 when Mr. Evangelist came to work in the Metro Project, was assigned there, did you have occasion to work with him in connection with this

particular case? That is, the case that is subject of this indictment. A. We were not assigned to the same case, but there was a time when I knew that he was going to make an audit of the Reynolds Construction Company. When that was determined, I did ask him to obtain anything and everything from the Reynolds Construction Company of any and all [RT 101] transactions between that company and Claiborne Leigh.

* * * * *

[RT 109] By Mr. Dillon:

Q. Mr. McElroy, do I understand your testimony correctly, did you say that prior to the time that Evangelist came to Reynolds Construction Company in March of 1964 that you or agents, revenue or special agents, acting under your direction or instructions, had obtained certain records from the law firm of Leigh & Rogers pertaining to their client, Reynolds Construction Company? A. I had obtained records from Mr. Claiborne Leigh relative to these transactions, yes, sir.

[RT 110] Q. Were these records you obtained settlement statements or contracts of sale? A. They were both.

Q. When you obtained these records from the law offices of Leigh & Rogers, did you first obtain permission from Reynolds Construction Company to obtain these records? A. I did not.

Q. To your knowledge, did Leigh or Rogers obtain permission from Reynolds Construction Company to give you these records of their client? A. I cannot answer for what they obtained. They did not tell me that they had obtained any such thing.

Q. Thank you. Mr. McElroy, you operate under the regulations of the Internal Revenue Service and of the Internal Revenue Code, do you not? A. One of which I do, yes, sir.

Q. Do you know of any regulatory or statutory authority for a special agent to investigate crimes other than crimes related to tax fraud?

Mr. Molenof: Objection.
The Court: Sustained.

By Mr. Dillon:

Q. Did you know in 1964 or did you learn in 1964 [RT 111] that the contracts of sale referred to in Exhibit 1 before you were not signed by the people whose names appear thereon? A. I did not.

Q. When did you first learn of this? A. I first learned of this—the collateral reports were sent out to the other offices scattered throughout the United States beginning in September 1965. The replies came back extending as far as I believe February 1966, the replies to these inquiries that were made from the alleged buyers of the property.

Q. To refresh your recollection, Mr. Evangelist testified this morning that he learned in early 1964 from Harlan Freeman that he in fact signed these documents. Is it your testimony that Evangelist did not report this fact to you when he gave you those documents? A. I don't recall Mr. Evangelist ever telling me that Mr. Freeman had signed the documents.

Q. Who in fact did tell you that Mr. Freeman signed those documents? A. No one. The only thing that I have proved was that the alleged buyers did not sign them. I have never proved who did sign them. I have only attempted to prove who did not sign them.

* * * * *

[RT 135]

Edward Joyce

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Batchelor:

Q. State your name and your occupation to the Court.
A. My name is Edward Joyce and I am an attorney in the

Department of Justice, Criminal Division, Organized Crime and Racketeering Section.

Q. Mr. Joyce, directing your attention to the summer of 1963, did you have occasion at that time to be in the same section of the Department of Justice? [RT 136] A. I was then employed in the Organized Crime and Racketeering Section, yes.

Q. At that time as part of your duties did you become the legal advisor to a special group called the Metro Project? A. I was the advisor to the Metro Project at approximately that time, yes, sir.

Q. During the balance of the tenure of its life, did you continue to be the advisor to this project? A. That's correct.

* * * * *

[RT 138] [The Witness] The project or the investigation was conducted by the Internal Revenue Service through their lines of communication and I was advisor to them.

Q. This was primarily investigation as to alleged corruption of public officials in Fairfax County? A. That was one of the important facets, that's correct.

Q. And gambling, was that part of it, too? A. Yes.

Q. It was an overall criminal investigation conducted by these men? A. Well, the investigation was an income tax investigation into various activities in Fairfax County, that is, to ascertain whether the people who were accepting bribes were paying income taxes on the bribes accepted and whether the people who were paying the bribes were properly charging them or not charging, rather, as an expense, and the gambling was conducted under Wager Tax Stamp Act.

Q. As a matter of fact, this was the utilization of the Internal Revenue Service to determine if in fact these things did exist; isn't that correct? A. Well, it was to ascertain whether if they did [RT 139] exist, the tax was also paid upon the monies paid.

Q. Incidentally, Mr. Joyce, has there been any tax prosecution arise out of the Metro Project? A. The first prose-

cution out of the Metro Project was a tax prosecution, yes, sir.

Q. Was that the Wilkens prosecution? A. That was the prosecution of Donald Wilkens, that is correct.

Q. Is that the only one? A. The only one as of this time, because—

Q. All right. A. Do you want the reason?

Q. Basically, all of the prosecutions that came out were bribery prosecutions, isn't that correct? A. Well, there were and there still are hanging fire income tax investigations. However, it is the policy of the Department not to have dual prosecutions on the same set of facts. Therefore, since there were the interstate prosecutions arising out of the bribery, the policy of the Department is not to also bring an income tax case on the same set of facts. So that the income tax cases are in limbo at the present time.

* * * * *

[RT 143] By Mr. Ahern:

Q. Now, having in mind your earlier testimony, Mr. Joyce, I believe you became associated with this Operation Metro in June of '63.

The Court: You will have to speak more loudly.

By Mr. Ahern:

Q. In June of '63 or thereabouts, I take it you were in more or less contact with McElroy and the agents who were doing the investigation and the processing of these cases; would that be a fairly correct statement? A. I was in contact with Mr. McElroy more when he became the supervisor than I was when he was acting as an agent. Before and after his supervisory capacity, my contact in 1963 was mainly with Mr. Oral Cole and Robert Rees (phonetic) who were the group supervisor and assistant.

Q. What I want to get at, I want to get down to times; that's what I am interested in now. Now, with respect to this particular case, I gather you were aware in January of '64 that with respect to this, as you call it, a 1014 case, that certain records that had come into the possession of

the Internal Revenue Service showed that there had been a number of straw transactions. You were aware of that, as well as Agent McElroy, I assume, in March of '64. Is that [RT 144] right? A. I can't say that I was aware in March of '64. The summarization of all the testimony and the meeting with the agents came about in the early part of '66.

Q. Well, I understand that. But I don't care about when you got to evaluating this or what you should do. My question to you is: Did you confer with McElroy or the other agent who testified here, Evangelist, concerning the significance of any violations of D.C. law, Title 22, Section 1301, Title 22, Section 1401, or possibly Title 18 of the U.S. Code, Section 317, as a result of these straw transactions and these evidences of forgeries that were made available to you?

Mr. Molenof: When?

Mr. Ahern: I am talking now about 1964, January, February, March.

A. I never conferred with Mr. Evangelist or Mr. McElroy with respect to violations of the D.C. Code that I can recall. The first consideration up until the time of the grand jury—as a matter of fact, up until the time that the case was turned over to Mr. Molenof—was that these involved violations of Section 1014 of Title 18, United States Code. I never considered the D.C. Code.

[RT 145] Q. Well, would it be a correct statement, then, so far as you were concerned it had not occurred to you until after the case was turned over to Molenof that these charges involved in this indictment would be brought under the D.C. Code? A. It occurred to Mr. Molenof. The case was turned over to Mr. Molenof. Mr. Molenof handled the case entirely. He has been in charge of the case.

Q. You spoke, however, I believe in your original examination that there were certain priorities that were given. Now, I gather the top priority were these bribery cases that you were prosecuting over in Virginia; isn't that right? A. That's right; they were to be presented to the grand jury immediately.

Q. And this particular case, whether it constituted, whether you had knowledge that forgeries had occurred or whether there had been a violation of the D.C. Code or the U.S. Code, so far as these 1014 cases were concerned, these were set aside, were they not, and the cases in Virginia were given priority; isn't that correct? A. They were given priority, there is no question about it.

[RT 146] They were given priority because that was the central purpose of your whole organization, was to go after this so-called bribery in Fairfax County; isn't that right? A. No. The central purpose of the organization was to look at the income tax investigations of the people in Fairfax County. The decision to proceed on Section 1952 was not made until there was an assessment of all of the evidence obtained.

* * * * *

[RT 150] Q. Well, were you the attorney that was, at least while you were with Operation Metro, that was to advise as to whether a prosecution would be had in the District for whatever facts you turned up about these straws and these alleged forgeries of these sales contracts? A. I was never with Operation Metro. My full-time [151] assignment at the time was that I was the head of the Interstate Facilities Unit in the Organized Crime and Racketeering Section. As such, I supervised the bringing of indictments and the prosecution of all violations of Section 1952 throughout the country both by the FBI and by the Internal Revenue Service.

As an additional duty, just as a part-time duty, I was the advisor to the project, and the project was run by the Internal Revenue Service agents through the Internal Revenue Service in their normal course. The District Director and the Chief of Intelligence were supervising the group supervisors, and above them were the Regional Commissioners.

* * * * *

[RT 208] Q. [By Mr. Warner]: Sir, in the period between January 1964 when, I believe you testified you first

became associated with [RT 209] Project Metro— A. [Agent Evangelist] Yes, sir.

Q. —and I believe you said March 23 when you went to Mr. Leigh— A. I didn't go to Mr. Leigh on March 23.

Q. I'm sorry, sir. Possibly I misunderstood as to March 23rd. Would it be April 10, then—I mean on March 10 when you first went to Reynolds? A. Yes, sir.

Q. Now, sir, in that period between January, February and March 10, can you tell us generally what you were doing? A. Yes, sir; I was examining a corporation which is not the subject of this.

Q. I see. Sir, during that period did you have conferences with Mr. McElroy? A. I have had conferences with him, I'm sure.

Q. Do you recall if during that period those conferences encompassed any of the defendants involved in this case? A. Well, the only way I could tell that is that on March 10 when I did go to Reynolds, I knew the other defendants in this case, I knew of Leigh, for example. I don't [RT 210] know whether I knew of Freeman at that particular time or not.

* * * * *

[RT 223] Q. [By Mr. Dillon]: Did you examine in Mr. Leigh's office any documents that referred to Reynolds Construction Company? [RT 224] A. [Agent Hansell] I can answer that only in this regard. After Mr. McElroy got into the case, we did—

The Court: Speak more loudly, please.

The Witness: After Mr. McElroy had entered the case, we did examine a number of settlement files. Some of these possibly pertained to Reynolds Construction Company.

* * * * *

[RT 225] Q. [By Mr. Bridgeman]: Were you present in Mr. Leigh's office in December of '63? A. I was there in November of '63. I am sure I probably went back in December.

Q. This was more or less than a continuing activity on your part from the spring of '63 down to December of that

year? A. I may have contacted Mr. Leigh in June, but I am sure that it wasn't all that time. I was on other activities, other audits.

Q. Nevertheless, there were a number of occasions throughout that period when you were in Mr. Leigh's office conducting an audit, is that right? A. That is right.

Q. You testified, I believe, that January of '64 was the first time that Mr. McElroy appeared in Mr. Leigh's office? [RT 226] A. Yes, that is correct.

Q. Can you state whether you had any discussions with Mr. McElroy with respect to Mr. Leigh's files at any time prior to that visit? A. Yes, I am sure we did.

Q. Did you from time to time report to Mr. McElroy as to your progress in auditing Mr. Leigh's files? A. No. This was an examination. This was an examination as any revenue agent would make of a man's books and records, of his tax return, for 1960. Mr. McElroy wouldn't have any occasion to be in there or ask me any questions until such time as I had possibly forwarded the case to the Intelligence Division.

Q. At what time did you refer the case to the Intelligence Division? A. December 1963.

Q. At that time I take it your reference to the Intelligence Division was the result of a decision on your part that there might be evidence of some crime committed by Mr. Leigh? A. That is correct.

Q. This was the occasion for Mr. McElroy's entry onto the scene? [RT 227] A. That is correct.

* * * * *

[RT 229] The Court: I think it is responsive. As a matter of fact, special agents are always there, aren't they? And what this witness is saying, if the Court understands him correctly, is that once the agent makes his audit, if he then wants to bring in a special agent, he brings the audit to the attention of the special agent. Is that correct?

The Witness: Yes, Your Honor.

[RT 230] The Court: Is that what you say you did in this case in December of 1963?

The Witness: That's correct, Your Honor.

The Court: Are you also saying to the Court that prior to December of '63 to your knowledge there was no other special agent that you knew anything about involved in the Leigh books?

The Witness: To my knowledge, there was not.

The Court: What about any other defendant in this action, did you personally have any knowledge of any other special agent having any inquiry with respect to any one of these defendants prior to December of 1963?

The Witness: To my knowledge, I don't know of any.

* * * * *

[RT 232] The Court: . . . This witness knew at the time that he started his investigation with Leigh that this was a project. Is that correct?

The Witness: That is correct.

* * * * *

[RT 259] Q. [By Mr. Warner]: Now, sir, before you entered upon that investigation, were you given any information with regard to possible claims of criminal liability? A. [Agent Shelton]: Absolutely not.

Q. All right. But the purpose, you previously stated, of Project Metro was to develop criminal cases against officials in Fairfax County, is that correct, sir? A. I think that was the primary purpose, yes, sir.

Q. All right, sir. Now, what was your purpose when you went to Mr. Rogers' office the first time? A. To conduct an examination of Mr. Rogers' personal income tax returns. Such examination grew out of the partnership of Leigh and Rogers which I was also responsible for.

* * * * *

[RT 296] By Mr. Batchelor:

Q. I say, in addition to that, Mr. Johnson, you were interested in finding out sources of income related to pos-

sible other types of activity that he might have been engaged in? A. I was interested in all items of income of Mr. Leigh.

Q. And with reference to all items of income, did you have a specific object in mind? The project had a specific object in mind, did it not? [RT 297] A. There were allegations.

Q. Of public corruption? A. Public corruption.

Mr. Batchelor: Thank you.

Mr. Ahern: May I ask one question I overlooked, Your Honor?

The Court: Very well.

By Mr. Ahern:

Q. We keep using this nice phrase "straw transaction." When you were there, I believe I asked you, when you went to Leigh's office in March of '64, you had knowledge that these so-called straw transactions were, a great many of them, phony, that the people didn't know about them; isn't that right? A. Not in March of '64.

Q. Didn't you testify that you knew in March of '64 about the straw transactions? A. We are talking about straw transactions, and it is a little different than what I understand the man is being tried for.

Q. Well, let me ask you this: Are you saying that in March of '64 that you had not inspected or you had no knowledge that some of these people who allegedly bought the [RT 298] property did not have a proprietary interest in it? A. The documents themselves had the word "straw" typed on it. I don't think as of March 1964 we knew that people's names might have been used without their permission.

Q. Had you contacted or anyone to your knowledge contacted any of these people at that time? A. Not to my knowledge, no, sir.

Mr. Ahern: Thank you.

* * * * *

5. Selected Transcript of Pretrial Proceedings, April 28, 1969

[RT 7] Mr. Molenof: I think my affidavit and, also, the affidavit of Mr. Swain clearly indicates that after the conclusion of the evidence—and, incidentally, no reporter is usually in the grand jury upon any summation, but after all of the witnesses had testified, I reviewed all of the evidence that we had previously submitted to the grand jury and the statutes involved.

I also told the grand jury, and the foreman also recollects, that they were the sole judges of the facts in this case as to whether or not an indictment should or should not be returned. I advised the grand jury—and a quorum was present and I addressed my remarks to the entire grand jury—that in the event they decided to return an indictment, that I had already prepared a lengthy indictment containing 13 counts. I thereupon indicated, so they would be familiar with [RT 8] the indictment, I reviewed the entire indictment with the grand jury count by count.

Incidentally, while I didn't put it in the memorandum, I read the entire first count to the grand jury. I read the entire second count to the grand jury, which was a violation of 1301, and I further told the grand jury that the remaining 11 counts were a repetition of Count II which was a violation of 1301, false pretenses, with the exception of the fact that they involved different transactions.

I went over each one of those remaining 11 counts with the grand jury. I told each one of the grand jurors exactly what the modus operandi was, and I repeated that to them in each one of the counts as reflected from my reading of the second count.

I advised the grand jury as to the particular transaction, the name of the person whose name was forged on the document.

I also enumerated count by count to the grand jury how much was allegedly fraudulently obtained in the way of loans. I did that on each and every one of the counts.

Now, as far as my action there was concerned, it was more enlightening to the grand jury than just to read the entire indictment, although I read the lengthy first count and [RT 9] the second count and then explained the remaining 11 counts, and I practically read all of the indictment so far as the remaining 11 counts are concerned.

I then told the grand jury it was time for them to deliberate. I left the indictment with them. The next thing I knew, the foreman came to the door sometime later and advised me that they had returned an indictment.

Then we made arrangements to have the indictment, while it was still in the foreman's hands, returned to Your Honor that very morning.

The Court: I will hear the testimony of the grand jury foreman.

Mr. Dillon: Mr. Swain.

Whereupon,

Evan L. Swain

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dillon:

Q. Would you state your full name and address? A. Evan L. Swain, 2937 Brinkley Road, Oxon Hill, Maryland.

Q. Mr. Swain, you were the foreman of the grand jury [RT 10] that handed down the indictment in this case?

A. I was.

Q. You have previously appeared as a witness in a preliminary hearing, is that true? A. Yes.

Q. Mr. Swain, are you the same Evan Swain who exe-

cutted an affidavit at the request of Mr. Molenof last week?

A. Yes.

Mr. Dillon: May I have the affidavit?

Mr. Molenof: I gave you a copy.

Mr. Dillon: Your Honor, Mr. Molenof has stipulated that the copy I am going to hand to Mr. Swain is a true copy of the copy in your file.

The Court: Let it be marked as an exhibit in connection with this hearing as Defendant Reynolds Exhibit 1.

The Deputy Clerk: Defendant Exhibit 1 of the Defendant Reynolds.

(Defendant Reynolds Exhibit No. 1 was marked for identification.)

By Mr. Dillon:

Q. Mr. Swain, I ask you to tell the Court whether that is a true copy of the affidavit you signed last week?

Mr. Molenof: May I ask if he can be shown the [RT 11] original so he can be sure this is a true copy?

Mr. Dillon: I think it is in that big file.

Mr. Molenof: I know it is, but he might not know.

The Court: It is a carbon copy of it.

Mr. Molenof: I would say yes.

The Court: I thought you stipulated it was a carbon copy.

Mr. Molenof: I did, but the witness was looking it over. I don't know whether he had any misgivings about it. So I think the best thing to do is look at the file. But we will stipulate to it as far as we are concerned.

The Witness: It is.

By Mr. Dillon:

Q. Your answer is it is a true copy? A. Yes.

Mr. Dillon: I submit this in evidence as Defendant Reynolds Exhibit 1.

The Court: Is there any question in your mind, Mr. Swain, about that?

The Witness: No, sir.

The Court: All right. He is satisfied that it is a true copy.

[RT 12] (Defendant Reynolds Exhibit No. 1 was received in evidence.)

By Mr. Dillon:

Q. Mr. Swain, the document in the file of this case indicates that on April 28, May 5, May 12, June 23 and September 22, 1967, the grand jury met on this case. Does that conform roughly to your recollection? A. Right. The dates may not be—I can't recall the dates but that sounds about the right time.

Mr. Dillon: Let the record show that I am referring to page 31 of the Government's consolidated response to all motions before the Court.

Mr. Molenof: May I make one observation here now? We also had a session, just for the record—this was written up, I think, before by someone else, but we did have a session and have a witness on September 22, 1967, prior to submitting the case to the grand jury. But this was written up by someone else. Just to clear the record, that is all right as far as it goes.

By Mr. Dillon:

Q. Do you recall what time the grand jury was scheduled to meet on the date that the indictment was handed down? [RT 13] A. No, sir, not that day.

Q. If I told you that it was ten o'clock in the morning, would that refresh your recollection? A. Well, I don't know. It was long about that time but I wouldn't say that was the definite time.

Q. On the day September 22, 1967, did any witness appear before the grand jury? A. That I don't remember as of now.

Q. Well, let me refer to your affidavit. You stated that on September 22, 1967, after all witnesses had tes-

tified, Mr. Molenof, with no one else present except the grand jury, reviewed the evidence previously submitted to the grand jury.

Did you mean that there was in fact a witness on that last date? A. No, sir, I didn't. I understand that to mean that after all witnesses had been brought before the grand jury to testify.

Q. But it is your recollection that there were in fact no witnesses on that last day? A. I can't recall exactly.

Q. Do you recall how long you were in the room on that last day, September 22nd?

The Court: What difference does it make?

[RT 14] Mr. Dillon: Well, Your Honor, I am going to try to establish through this witness' testimony that they were in there about 10 minutes.

The Court: All right, he can tell us how long they were in there, how long they considered this indictment, how long it took, what happened that day, September 22nd. He can tell us in a narrative form, if he recalls.

By Mr. Dillon:

Q. How long were you in that room that day? A. Well, after Mr. Molenof left—

Q. No. In entirety.

The Court: All together from the time you convened your grand jury until the time you came out and returned that indictment in this courtroom, how long did that take?

The Witness: Well, I am afraid I can't tell you exactly.

By Mr. Dillon:

Q. If I told you that I was outside that grand jury room at 18 minutes after ten and that the grand jury had already met and been in Judge Robinson's courtroom and presented their indictment, would that refresh your recollection?

Mr. Molenof: I object, and I object further that his recollection is vague.

[RT 15] The Court: Your objection is overruled. I want to know exactly what happened on the morning of September 22nd as far as the grand jury is concerned in connection with this indictment, and I want Mr. Swain to tell us from his own best recollection from the time he got to the court house that morning until he walked into this courtroom and returned that indictment what he recalls having happened?

By Mr. Dillon:

Q. Could you tell us? A. Well, after meeting—

The Court: No, no. I want you to start with the time you got—you got to the court house at what time that morning, Mr. Swain?

The Witness: I am afraid I can't answer that because I don't know.

The Court: What did you do when you first came to the court house that morning?

The Witness: Well, we generally go to the jury room and assemble until the time—see, we have a meeting time but I can't recall that day as to what it was because these were not the same times every day or every time we met. We were working on several occasions. I can't recall the meeting time of one from the other now.

[RT 16] But when we came, we usually go to the jury room that we are assigned to and get our books from the clerk or from the attorney's office, and when everyone is present, when we have a quorum and all the people are there, we conduct the grand jury.

Mr. Molenof, after the meeting started, and I can't tell you whether we had a witness that day or not because I don't recall, but when Mr. Molenof told us, summarized all the evidence, went over it step by step, went over the first part, all the parts, there were several parts, I don't recall how many there were, and then he told us, as they do in the court room, that we are to decide one way or the other to indict or not to indict, and then they left us the indictment all written up in an envelope.

The Court: I didn't hear that last?

The Witness: The indictment was in one of those folders, and it was up to us. Then after everyone left, why, we discussed the case among ourselves, and I don't know how long, whether it took a few minutes or how long it took, but after that we made a vote and returned the indictment.

Then I called Mr. Molenof. He came up. We told him we had returned the indictment, and they arranged to have a Court to convene, and we came up and returned the indictment, [RT 17] I believe in this Court. I am not sure of the number. But to this Judge.

By Mr. Dillon:

Q. Could you estimate the total time it took to complete everything you just described? A. As of now, no, I can't tell you the amount of time.

Q. You testified that Mr. Molenof left a copy of the indictment in a folder? A. No; he left the indictment.

Q. A copy of the indictment? A. Right.

Q. Was that copy shown to the grand jurors? A. The copy was left on the desk with us.

Q. Was that copy read by the grand jurors? A. I don't know whether any member of it did nor not. But I didn't read it to them.

Q. Your recollection is that you don't know whether anybody else did? A. That I don't know. It was there, it was available but I can't recall anyone whether or not they read it.

Q. Did Mr. Molenof instruct you or suggest to you or any other grand juror that they read the indictment before they voted? [RT 18] A. No, sir.

Q. Did Mr. Molenof in fact read the indictment before he left the room? A. Well, it seems that he read the first part, but I can't remember how far down or how many counts that there were on it because we had gone over all of this before and we had listened to each of the

witnesses talk. And some of this was repetition, the names changing but the counts were similar.

Q. In your affidavit you state that he, meaning Mr. Molenof, advised the said jury of which a quorum was present of the statutes applicable thereto. Did Mr. Molenof read the statutes to you or did he tell you about them?

A. Well, he told us about them sometime during the testimony, during the hearings of the witnesses, explained the laws to us. There were several. The numbers I don't know what they are as of now, I don't recall which number applies to which.

Q. I am referring to September 22nd, did he read the statutes? A. I can't recall whether he read the statutes or not.

Q. Did he show you the statutes? A printed form? A. I don't recall whether he did or not.

Q. Did he have a copy of the statutes with him? [RT 19] A. I can't say. He had material with him but I don't know what it was.

Q. Mr. Swain, did you in fact read that indictment before you signed it? A. No, sir.

Q. So is it a fair statement to say that what you on September 22nd signed as a true bill was not in fact known to you to be a true bill?

Mr. Molenof: Object.

The Court: Sustained.

By Mr. Dillon:

Q. After you came out of the room, did Mr. Molenof ask you if you had read the indictment before signing it? A. I don't recall whether he did or not.

Mr. Dillon: I have no further questions.

By Mr. Ahern:

Q. Mr. Swain, let me see if I understood your testimony correctly. You say you had a meeting that you were supposed to be, you know, in your grand jury room. Would you

get a slip of paper or how would you be advised as to what time you were to be in the room? A. Well, I think the time was set up in the meeting before, either that or when the witnesses that would be avail- [RT 20] able Mr. Molenof, would get in touch with us and tell us what time the grand jury would meet.

Q. I see. Now, you testified that Mr. Molenof left a copy of this indictment in the room. Now, am I clear, would it in an envelope or outside an envelope?

Mr. Molenof: I don't think that is the testimony. I didn't leave a copy of it. I left the indictment. I think the record should be clear on that.

By Mr. Ahern:

Q. Let me be more precise. Left the proposed indictment in the grand jury room. Was it in an envelope or was it outside an envelope? I heard you mention something about an envelope. A. The way I can remember, it was in one of these manila type folders that fold over but is not sealed.

Q. Now, you testified that Mr. Molenof read a part of the indictment to you. You don't know yourself how far down he got, is that it? A. No, sir. Just the first part.

Q. The first part.

* * * * *

[RT 29] Mr. Molenof: May it please the Court, there are only a few points that I do want to mention. As Mr. Dillon or one gentleman indicated, I did not summarize each count of the indictment. I explained, as I indicated, exactly what each count was in light of the evidence. The grand jury had the indictment. I was reading from the indictment at the time [RT 30] I explained the indictment to them, each and every count.

The Court: Isn't it a fact, Mr. Molenof, that, if you will permit me to interrupt you.

Mr. Molenof: Yes, sir.

The Court: That it is uncontradicted at this moment that the indictment that you had prepared was not read in its entirety to this grand jury? Is that correct?

Mr. Molenof: That is right. I did read Count I and I did read Count II. And Count II was a Section 1301 false pretenses count. The remaining 11 counts were false pretense counts. I advised the jury of the fact, what I did was to explain at that time what each and every succeeding count was, pointing out the language.

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6. Selected Transcript of Pretrial Proceedings, May 5, 1969

[RT 2] The Court: Very well. I understand that counsel wish to renew certain motions and we will take that up first.

Mr. Bridgeman: If Your Honor please, I am not quite sure that this is what Your Honor's statement was addressed to, but we did file on Friday a motion for reconsideration of the Court's order of May 2nd, that is, defendants Reynolds, Rogers, Dienelt and Freeman.

I would like, if I may for just a few minutes, to call Your Honor's attention to some points that perhaps might not have been emphasized in the original motion that I think bear emphasis now. We are asking Your Honor at this time to reconsider the order of the 2nd of May and on reconsideration to grant the motion to dismiss the indictment or, in the [RT 3] alternative, to grant a stay of the trial pending the ultimate disposition of our motion.

That request is made basically on three grounds:

No. 1, I think what the Court was suggesting in its May 2nd order was that counsel were dilatory in failing earlier to raise the motion to dismiss the indictment. I suggest, your Honor, that we were not, for these reasons:

No. 1, no counsel had any knowledge of the fact that the foreman of the grand jury had failed to read the indictment until April 21, 1969, when that fact was discovered by

Mr. Dillon and communicated to me on that day. And that is the day when Mr. Dillon and I filed our motions. Other counsel, as I understand it, did not learn that fact until the very day of hearing, that is, April 28.

Furthermore, I think no one reasonably could have been aware of the fact or reasonably could have been expected to learn of the fact that the foreman of the grand jury had not read the indictment, first of all, because the foremen may not under the rules disclose information about what occurred in the grand jury room. The fact that this bit of information turned up was in a real sense, I think, a fluke or an accident, and it could not normally have been expected to be revealed without order of the court.

The Court: When we argued the motion that was made in connection with the suggestion that there had been an [RT 4] improper swearing of the grand jury, did we not take testimony as to what transpired?

Mr. Bridgeman: Only with respect to the matter of the swearing of the grand jurors to secrecy, Your Honor.

The Court: That had to do with what went on during the grand jury proceedings, did it not?

Mr. Bridgeman: Yes, sir.

The Court: So there was no flat prohibition by this court to prohibit an exploration as to what transpired in connection with the grand jury proceedings.

Mr. Bridgeman: No, sir, there was not a flat prohibition. But I think any defense counsel is entitled to assume regularity within the secrecy of the grand jury room.

The Court: Even as to the swearing of the grand jurors?

Mr. Bridgeman: Well, this was something that came to counsel's attention, again, to Mr. Dillon's attention, through a witness before the grand jury who refused to talk to him. It was not a member of the grand jury itself that provided the information that came to him. It came to him in the course of investigation of other matters not directly related as he saw it at that time to the grand jury problem.

In summary, I think no one knew or could have known prior to April 21, no one had any reason to expect that there was any irregularity in the proceedings prior to that [RT 5] time.

I believed that the court had recognized that point when it agreed to hear argument and to take testimony and indicated that there would be a decision on the merits of the motion when it was heard on April 28th.

Finally, we argue that any question of delay is immaterial in any event because this is a jurisdictional defect. I would like to read the Court Rule 12(b)(2) of the Federal Rules of Criminal Procedure which says: "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the Court at any time during the pendency of the proceeding."

Now, Rule 7 of the Federal Rules of Criminal Procedure provides that an offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information.

Now, there was no waiver of indictment in this case, Your Honor.

The Court: Then there was an indictment, was there not?

Mr. Bridgeman: No, sir. Our position is that this is, in effect, nothing more than an information. It was not a valid indictment by the grand jury. The evidence is that it was not read and approved by twelve jurors or more. [RT 6] It was not read by the foreman of the grand jury. It is not only not a proper indictment; it is simply a form of an indictment, but not, in fact an indictment at all.

For this reason, our position is that there is a jurisdictional defect in the indictment and there is no matter before the Court to be tried.

Thank you, Your Honor.

* * * * *

[RT 9] Mr. Burns: Your Honor, I will go over briefly some of the points that were earlier made, since they have come up again this morning. And that is that the Government read through at the grand jury session prior to the return [RT 10] of the indictment the entire Counts 1 and 2. And as was said by Mr. Molenof and as testified to by the grand jury foreman, Mr. Swain, the remaining counts were reviewed thoroughly in detail count by count.

Now, the second count is basically the same as the remaining counts with different names. There was relation to that and independent review of each count, so the indictment in its entirety was thoroughly reviewed to the grand jury.

Moreover, I would point out that there is no evidence in the record to show that the grand jury convened at 10:00 o'clock other than the unsupported statement of Mr. Dillon.

The notes of the court reporter in your court do not show the time the grand jury convened but merely the time the grand jury came in here.

Moreover, the Government is prepared to show that Mr. Dillon was not present in the hallway during the entire grand jury session on September 22nd. I will also note that there was some confusion, and Mr. Molenof did not recall exactly whether there had been a witness appearing on that date on September 22nd at that grand jury session. It is now recalled on reviewing all of the records that there were no witnesses appearing on that date.

The Government is also prepared to prove, should [RT 11] the Court deem it necessary, that the grand jury convened at 9:15 on that morning.

I also feel that it's very important that we understand that this information didn't just happen to appear in the last two weeks or on September 21st. Mr. Dillon telephoned the grand jury foreman, Mr. Swain, and asked him whether he had in fact read the indictment, and not realizing the problems involved at the time, Mr. Swain indicated that he had not read it. He immediately thereafter realized what

had happened and brought out the point to Mr. Dillon that he shouldn't have answered that question. So that this is not a fact that just came up now and couldn't have come up upon the presentation of a similar question at an earlier date to Mr. Swain.

* * * * *

[RT 12] Mr. Dillon: If it please the Court, I believe there have been certain factual allegations made by the Government both this morning and at the last session which bear the Court's scrutiny. This matter of our ability to discover what I discovered on April 21st, Your Honor, if your Honor will give me the opportunity, I would like to briefly review the facts as I saw them.

When I discovered in April of 1967 by approaching a witness who worked for my defendant, Mr. George Steele, that he had been sworn to secrecy, I was alerted to a defect in the proceedings of the grand jury. I brought this to the attention of Mr. Molenof, I believe it was in August, at a [RT 13] conference with him. Mr. Molenof told me—Mr. Molenof, who was in that grand jury room on four occasions previous to my talk with him—told me that he didn't know of any oath given to the grand jury swearing them to secrecy. But he suggested that if I felt that this was a defect, then why don't I take it up with the Court.

Well, Your Honor, putting this case in the perspective that it was in August of 1967, we have this: I was retained by a man who was prominent in business and in social affairs in Arlington County. This man was under investigation for fraud. There was no proceeding before this Court and, in my judgment, for me to come in to open court where I had no case to present to the Court and reveal the fact that my client, who very well may not have been indicted, was under investigation for fraud, would in fact have ruined him.

After I read the Gaither opinion in April, I had certain discussions with Mr. Bridgeman. I knew and I was very

well aware of the fact that grand jurors were precluded by a Federal statute from revealing what went on in a grand jury room. Since I had been present in the hallway on September 22, 1967, certain other matters came to my mind. In trying to prevent this indictment, the reason I was present in the hall, Your Honor, was because I intended on the morning of September 22nd to accompany the grand jury and Mr. Molenof [RT 14] into your court room and to try to prevent the indictment on the basis of the illegal swearing of the grand jurors. Whether or not I could have done it, I have serious doubts, but that was my intention.

Now, I telephoned Mr. Molenof a day or two prior to September 22, 1967, and I asked him, Mr. Molenof, what time are you going to go into court, are you going to convene the grand jury?

He told me 10:00 o'clock. I asked him what time do you expect to go into court to present the indictment? He told me that he didn't know, but that it surely wouldn't be before 10:30, maybe 11:00 or 11:30. He said that was up to the grand jury.

I came down to the court at 15 minutes after 10:00, and in the company of Mr. Myron Ehrlich, I walked up to the grand jury room at approximately 10:18. I approached the Marshal and I asked him if the grand jury was still in that room. He said yes. I said is that the Molenof grand jury? He said no. He said the Molenof grand jury has convened, has voted, and has gone into the court room and has gone home.

Now, Your Honor, it is true that I did not know what time that grand jury convened, except Mr. Molenof told me 10:00 o'clock, and I chose to believe that. I chose to believe that then, and I choose to believe it now. But there [RT 15] were 23 witnesses in that grand jury room. The grand jury foreman, I asked him what time they convened, and he said it was around that time, 10:00 o'clock.

Now, Your Honor, I don't think it would be unfair for me to call upon Mr. Molenof to make an admission to this Court that that grand jury did in fact convene at 10:00 o'clock. I think if that admission is made, it is clear to the Court that what Mr. Molenof represented to this Court was impossible that he had read two counts comprising about 2,000 words, that he had reviewed "all the evidence presented to the grand jury at four full day sessions previously." That he had instructed the grand jurors as to their duties. That he had then proceeded into the court room—all in less than 10 minutes.

Your Honor, I submit that is preposterous.

I thank Your Honor for listening to what I hope Mr. Molenof will confirm is a factual presentation of what happened.

The Court: Anything more?

The ruling of the Court in connection with this motion was in view of the specific wording of Federal Rule 12(b)(2). It was the judgment of the Court ruling on the motion that there is a distinction in the Rule between those matters that are procedural with respect to a grand jury and those matters which are jurisdictional.

[RT 16] Research indicates that insofar as procedural matters are concerned, the Rule specifically provides, first of all, that they are to be brought to the attention of the Court before the entry of the plea, and thereafter may be considered by the Court when in the judgment of the Court they are otherwise timely.

But in any event, insofar as Rule 12 is concerned, it has been consistently construed that failure to bring all of the matters with respect to procedural defects in the grand jury to the attention of the Court at the time any motion is made with respect to the grand jury proceeding, including all of those matters which either were in fact known or could have been with due diligence discovered, effect a waiver. And in this situation it was the judgment of the Court, as announced in the opinion, that to bring this mo-

tion under these conditions and with these facts before the Court at the time it was brought, did not justify setting aside any waiver. In fact, a waiver had been in effect since the original motion for dismissal of the grand jury was argued by counsel and joined in by all other counsel, almost a year ago.

Now, the posture of this matter on the record that has been made—and there should be no assumption by counsel that because the Court permits extended argument or testimony [RT 17] before making any predetermination of its disposition of any matter—the Court indicated to counsel at the outset of this matter when it was assigned that full opportunity would be given to develop all of the facts which counsel alleged pertained to either pretrial aspects of it or, in fact, the trial of the case itself. And it was with that intention alone that the Court held extensive argument on the original motion to dismiss the indictment under what was then thought to be the controlling decision of the Gaither case and even though the Gaither case was reversed, in effect, by the Court of Appeals, the Court nevertheless permitted argument because counsel then contended that there were matters not controlled by the Gaither case which should be brought to the attention of the Court, and were forcefully and ably brought to the attention of the Court by counsel.

Now, the motion for reconsideration is, in the judgment of the Court, not well taken and the Court denies the motion for reconsideration for the reasons set forth in the written order entered last week.

* * * * *

7. Order of the United States Court of Appeals, No. 23,006.
Filed May 5, 1969

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1968

Criminal No. 1208-67

No. 23,006

WALTER R. REYNOLDS, E. NEIL ROGERS, BERTRAM G.
DIENELT, JR., and HARLAN E. FREEMAN, *Petitioners*

v.

THE HONORABLE AUBREY E. ROBINSON, JR., *Respondent*

Before: Wright and McGowan, Circuit Judges,
in Chambers

ORDER

On consideration of petitioners' petition for writ of prohibition or writ of mandamus and of petitioners' motion for a stay, it is

ORDERED by the Court that petitioners' aforesaid petition and motion are denied.

Per Curiam

8. Selected Trial Transcript

[T. 70]

Everett S. Slagel

was called as a witness for the Government, and having been first duly sworn was examined by counsel and testified as follows:

[T. 71] Direct Examination

By Mr. Burns:

Q. Mr. Slagel, I would ask you to state your name and occupation please? A. My name is Everett S. Slagel and I am an attorney at law.

Q. Where do you practice law? A. At Falls Church and in Northern Virginia.

Q. In Northern Virginia? A. Yes.

The Court: Counsel, would you stand over here so that all of the sixteen of these jurors can hear everything that you have to say.

The Witness: My office is at 450 West Broad Street, in Falls Church, and I am a member of the firm of Deem and Slagel.

Q. Were you subpoenaed to produce deed of trust No. 6215 filed in Deed Book 2259? A. Yes.

Q. And do you have the document before you? A. Yes, I do. This is the document.

[T. 72] Mr. Burns: Your Honor, I have before me deed of trust No. 6215 which I would like to have identified as Government's Exhibit No. 1.

(Whereupon, Government's Exhibit No. 1 was duly marked for identification.)

Mr. Burns: Your Honor, under the system that we set up I will give you a number, if you will bear with me—we set up a schedule of numbers for certain documents which we didn't have previously so that we wouldn't have a repetition of the label.

The Court: All right, I will ask the Jury to take a

short recess so that I can understand what you are going to do, then.

Ladies and Gentlemen, you may take a short recess.

(Whereupon, the members of the Jury retired from the Courtroom, and the document marked as Government's Exhibit No. 1 for identification, was returned to counsel for renumbering.)

The Court: Now, would you explain to me what you are going to do?

[T. 73] Mr. Burns: All right. Your Honor, under the system that we had set up for numbering, I believe we numbered six basic documents, one through six, with a different letter for each of the seventeen transactions.

We then proceeded for other documents to use other numbers on down to, I believe it was thirteen. This is one document that we did not have in our possession and so we did not have a number on it—

The Court: Well, where does it fit in or belong in your scheme?

Mr. Burns: I think it is 6-P in the scheme at that time, Government's Exhibit No. 6-P.

The Court: Well, is it a document which defense counsel have seen?

Mr. Burns: No, Your Honor, it is not.

The Court: Well, let them examine it now and then let it be marked as it is in the scheme so that we won't have any problems.

Mr. Dillon: For clarification purposes, it is my understanding, Your Honor, and correct me if I am wrong, but we had agreed to exhibit numbers for the exhibits which appear [T. 74] on this document that I have in front of me which is headed Exhibit Number Description and Remarks, which was furnished to us by Mr. Burns and Mr. Molenof, and those are the only documents that are going to be exhibited into evidence, isn't that correct?

Mr. Molenof: No.

The Court: Absolutely not, no. He is placing this document where it belonged in the scheme of documents.

Mr. Dillon: This was one of these documents?

The Court: The numbered ones—yes.

Mr. Dillon: It was one of these documents, oh.

The Court: What is your point, Mr. Dillon?

Mr. Dillon: Well, I thought I understood Mr. Burns to say that they were not going to have any other documents submitted into evidence than those on the list that we spent all day preparing in Court.

The Court: Well, there may well be other documents but they will not be numerous, I take it.

Mr. Molenof: Your Honor, I don't know, I don't know how numerous. I don't know what you would call numerous. There may be fifteen or twenty or twenty-five of them that [T. 75] we have gotten later, and we didn't have them that day so we couldn't have them marked.

The Court: They are part of these documents in this scheme showing the various transactions?

Mr. Molenof: That we have listed, you mean that, I don't quite follow?

The Court: These are documents which you did not have available but which fill in as to the various properties.

Mr. Molenof: They fill in, that's right.

The Court: In connection with showing what documents pertained to which property, is that correct?

Mr. Molenof: That's correct.

The Court: Well, those documents are obviously going to be admitted by the Court and there remains only to be resolved as between counsel whether they have had an opportunity to see them, and all I am suggesting is that any document which was not available at the time we had the pretrial conference in this case for the marking of documents, will now be exhibited to defense counsel and the Government is going to be required to use the documentation numerically according to the numbering system that we had agreed upon.

[T. 76] I am advised now, with respect to this particular document, that it is numbered or designated as 6-P, is that correct?

Mr. Burns: That's correct.

Mr. Molenof: Let us say one further thing, while we are here, Your Honor, that copies were available for counsel's inspection but we have to produce the originals if they are available.

The Court: Yes. In that regard, then, do you have all of the documents in one place?

Mr. Molenof: Which documents?

The Court: Those twenty-five or thirty documents which you say have not been marked? I suggest at the adjournment of trial today those documents that are available be exhibited to defense counsel as they would have been had they been available originally. Is there any reason why that could not be done?

* * * * *

[T. 98]

Robert L. Stoy

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Molenof:

Q. Mr. Stoy, will you please state your full name, address and occupation to the Court and the jury, please. A. Robert L. Stoy, Assistant Secretary, Eastern Savings and Loan Association, 336 Pennsylvania Avenue, S.E.

[T. 99] Q. Were you employed with Eastern Savings and Loan in 1962 and 1963? A. Yes, sir.

Q. What was your position there then? A. Assistant Treasurer.

* * * * *

[T. 120] Q. Now, Mr. Stoy, I ask you with respect to the general practice at Eastern Building or Savings and Loan

Association in 1962 and 1963, concerning just what procedure is followed after an application for a loan is filed and after favorable consideration, what is the practice and procedure as to what is done thereafter to perfect a loan?

A. Well, the application is received and given to the appraiser to appraise. That is returned. The loan committee comprised of either two or three of the senior officers study that and make recommendations to the executive committee. And then the executive committee passes on or commits the loans. That is comprised of the president of the association and four members of the board of directors.

Q. Then what happens then, sir? A. Well, at that point the commitment notice is sent to the person signing the application and telling him that [T. 121] we are ready.

Q. Is it sent to the owner or the applicant? A. It's sent to the owner in care of whoever signed the application, the agent or whoever he may be.

Q. The agent or whoever he may be? I didn't hear that. A. Yes, sir, the agent or whoever signed the application.

Q. What is the purpose of that? A. That is to convey to him that we are committing the loan.

Q. What if anything happens after that? A. Well, the next step would be for them to get the title search and get the title binders into us so as to settle.

Q. What is a title binder, sir? A. That is the title record and shows you who owns the property and what the situation is going to be and who is going to make the trust. From that information we proceed from that.

Q. Who is that received from? A. It is received from either a title company or a settlement attorney.

Q. Settlement attorney. Now, after you receive that, what would be the general practice as to what has to be done? A. Well, the next step would be to set a date for [T. 122] settlement, and at that point we would then proceed with preparing the necessary papers to complete the settlement.

Q. What papers are prepared, sir? A. Well, there is a deed of trust, deed of trust note.

Q. Go a little slower. A. There is a deed of trust, a deed of trust note, there is a signature card, and usually a payment book, and then these things are forwarded to the settling attorney.

Q. Settlement attorney. Now, what is the deed of trust? What is the purpose of that, sir? A. That is the paper that goes on record encumbering the property.

Q. Who is that to be executed by? A. That is executed by the borrowers.

Q. By the borrowers? A. Yes, sir.

Q. Is that returned to you, sir, according to practice? A. After recording.

Q. What other papers do you say are submitted to the settlement attorney? A. Deed of trust note and signature card.

Q. What is a signature card, sir? A. Well, that indicates that the man has become a member [T. 123] of the association and is entitled to a loan and shows the information on him in regard to the loan.

Q. What has to be done with respect to the signature card? A. Well, it has to be signed by the borrowers, also.

Q. Who is that sent to? A. That is sent to the settling attorney along with all the papers.

Q. After that is done, where does that go? A. That comes back to the association.

Q. Now, did you enumerate any other paper in your enumeration? A. A deed of trust, a deed of trust note, a signature card, and then at that time we were using passbooks with the payment notice on it.

Q. Who was the passbook designated to go to? A. That goes to the people, the borrowers. It is sent to the settling attorney and we ask him to give it to them at the time of settlement.

Q. At the time of settlement? A. Yes, sir.

Q. Do you know what a settlement sheet is, sir? A. Well, that is the figures that shows what [T. 124] disbursement of the money was made.

Q. Where does the settlement sheet come into play? A. The settlement sheet comes into play at the attorney's office.

Q. What attorney's office? A. The settling attorney, whoever settles the loan.

Q. What is a settlement sheet comprised of? A. Well, it's the figures that show the disbursement of the money.

Q. What money are you talking about, sir? A. As far as we are concerned, it would be the borrower, the money that we have loaned. Also, it shows the sales price, and so forth, all the figures.

Q. Is that to be returned to you, sir? A. A copy of it is to be returned for our files, yes, sir.

Q. After all that is received, what if anything is done then? A. After that is received, the executed note and executed papers are received, we then disburse the money.

Q. Who is the money disbursed to? A. Disbursed to the settling attorney, to the people.

Q. Now, let me ask you this question, sir: According [T. 125] to your practice over at Eastern in 1962 and '63, where there is a construction loan on property at the time the loan is going to be made, what happens to the construction loan, how is that handled? A. Well, a construction loan on a property, a new loan is made and then the construction loan is paid off.

Q. How is that paid off? Is there any particular method? A. That is paid off actually by us, because we deduct from the amount of the loan to pay that off and send the net amount to the settling attorney's office.

Mr. Molenof: No further questions.

The Court: Mr. Dillon.

Cross-Examination

By Mr. Dillon:

Q. Mr. Stoy, would you please repeat what function you performed at Eastern Savings and Loan in 1962? A. I was assistant treasurer and settlement officer.

Q. You described in detail the procedures that were followed in Eastern Savings and Loan in 1962. Could you explain just what the application consisted of that you described before? A. Do you mean the application for a loan?

[T. 126] Q. Yes. A. Well, it's a sheet of paper that has a person's name on it who is applying for the loan and a description of the property, the type of building, and so forth, on there.

Q. Is there any credit information on there? A. Yes, sir, there is credit information put on there.

Q. Could you describe what that is? A. Well, whatever information they get in regard to the man's financial status and other holdings.

Q. Does it consist of his assets and his liabilities? A. Yes, sir.

Q. Did you in 1962 in fact have knowledge that the 17 people named by Mr. Molenof and their wives did in fact exist? A. What is this now?

Q. Did you in 1962 have knowledge that the 17 people and their wives who were named by Mr. Molenof did in fact exist? A. I personally didn't have any knowledge, no, sir.

Q. Did you make any attempt to contact these people? A. No, sir.

Q. Did you do a credit report on them? A. No, sir, we were not required to.

[T. 127] Q. There is evidence in this record that \$607,000 was loaned to the Reynolds Construction Company on these 17 transactions. Is it your testimony that Eastern Savings and Loan never even made a ten cent phone call in order to contact these people?

Mr. Molenof: I object. I think it is argumentative.

The Court: He may answer the question.

The Witness: It was not the practice of the association to investigate any credit. It was taken at face value whatever was there.

By Mr. Dillon:

Q. So your answer is no? A. No. It's no, yes, sir.

Q. How were payments made on these mortgage transactions? A. I could not answer that, sir. I am not familiar with the payments.

Q. Are you presently the secretary of Eastern Savings and Loan? A. Just the last two months.

Q. Do you have access to the records of Eastern Savings and Loan?

Mr. Molenof: I object on the ground this is outside of the direct. He was asked about general practice.

[T. 128] The Court: Sustained.

By Mr. Dillon:

Q. You testified, I believe, that the papers in these transactions came to Eastern Savings and Loan through an agent; is that correct? A. Yes, sir.

Q. And that agent was Marbury Stamp? A. To my recollection, it was.

Q. Did any other papers come directly to you from Reynolds Construction Company? A. I cannot answer that.

Q. You testified, I believe, that after the papers were processed at the bank, they then were sent to the settlement attorney's office; is that correct? A. We prepared the necessary papers for the loan and sent them to the settlement attorney, yes, sir.

Q. Drawing your attention to the construction loans that you testified were put on each of these 17 properties, did Walter Reynolds and his wife, Sherry Reynolds, personally guarantee those construction loans? A. To my recollection, they did, sir.

Q. Is it not a fact that Walter Reynolds and Sherry Reynolds had on file at Eastern Savings and Loan a credit [T. 129] statement, a financial statement? A. I am sure they did, yes, sir.

Q. Have you had an opportunity to examine that credit statement? A. Not recently, no, sir.

Q. Did you in 1962? A. I don't recall whether I personally did or not.

Q. Do you have knowledge that anyone in Eastern Savings and Loan did in fact examine that? A. I could not answer that, sir.

Q. You testified that these properties were appraised. Now, who hired the appraisers? A. The appraisers are Thomas J. Owen & Sons here in Washington. They have been appraisers for Eastern Savings and Loan for many years and do all appraisal work for us.

Q. So your testimony is that Eastern Savings and Loan hired the appraiser? A. We don't hire them. Well, it is a fee-basis thing, yes.

Q. They certainly were not hired by Reynolds Construction Company? A. No, absolutely not.

Q. Did these appraisers in each of these 17 transactions [T. 130] place in your records a signed written appraisal? A. Yes, sir.

Q. When you made a loan on this appraisal, did you loan a hundred percent of the value? A. No, sir.

Q. Could you tell the jury approximately how much you loaned on each of these transactions? A. I would say 80 percent at the most.

Q. If I told you that the records available in Eastern Savings and Loan show that you loaned 70 to 75 percent on these 17 transactions, would that refresh your memory? A. That would be probably somewhere the figure. Usually loans run around 70 to 75.

Q. In each of these transactions, is it not true that Eastern Savings and Loan was secured by a mortgage on a house whose value, according to your appraisers, was

equal to 30 percent more than you loaned? A. Well, I can't say exactly 30 percent.

Q. Approximately, 20 to 30 percent? A. Yes.

Mr. Dillon: No further questions.

By Mr. Batchelor:

Q. Mr. Stoy, Mr. Molenof asked you about these names [T. 131] and numbers.

The Court: I think you are going to have to speak more loudly so your co-counsel can hear you.

By Mr. Batchelor:

Q. The names and numbers that Mr. Molenof asked you about in connection with construction loans, were those construction loans made to those people or were those construction loans made to the Reynolds Construction Company? A. Made to Reynolds Construction Company.

Q. I see. So you were just identifying properties by those names? A. That is correct.

Q. Now, I understand you to testify that the procedure at your institution at that time, the general procedure was as you outlined it here. Was the procedure that you followed in these particular cases the same procedure? A. To the best of my knowledge, the same procedures followed in all loans by Eastern.

Q. You say first an application was filed? A. Yes.

Q. That application consisted of a request for a loan on that particular piece of property and the name of the purchasers and credit information about the purchasers? [T. 132] A. Yes, sir.

Q. Now, the credit information about the purchasers, I assume, was furnished to you by the mortgage broker? It was sent to you along with the application? A. I think that is correct.

Q. Now, that is on a form provided by your organization, is it not? A. Right.

Q. And at the bottom of that form appears a place for a signature and it says, "Credit approved", does it not? A. Yes, sir.

Q. Does your name appear as the party approving the credit of those individuals? A. Yes, sir.

Q. Now, that information in the credit information consisted of the place they worked, how much they made, how much debts they had, how many assets they had, how much money they had in the bank; is that correct? A. I don't know how far it went on all of them. I can't remember them all. But that is the general idea.

Q. Well, it was pretty thorough wasn't it, sir? You wanted to know the assets and liabilities, didn't you? A. I think it was on most of them, yes, sir.

[T. 133] Q. Now, this loan committee I assume, examined both the credit approval and the appraisal of the property by the gentlemen you have just mentioned here in your previous testimony?

Mr. Molenof: I object on the ground it is outside of the direct, inasmuch as I asked the general practice.

Mr. Batchelor: Your Honor, it is immaterial.

The Court: Your objection is overruled. I am going to say it one more time. Make your objection, counsel. The Court will rule on the objection unless I ask you to come to the bench. Do not argue in open court.

Mr. Batchelor: I apologize to the Court.

By Mr. Batchelor:

Q. Is that true, sir? A. Would you restate the question.

Q. Yes, sir. Is it not true that the appraisal and credit report went to the loan committee who made a recommendation to the executive committee? A. Right.

Q. Now, is it not also true, Mr. Stoy, that these loans were made solely on the basis of the appraisal of its property? A. Loans made on the appraisal of the property?

[T. 134] Q. Solely, in these cases solely on the basis of this property, the appraisal of this property. A. All loans

are made on appraisal of the property, to my understanding.

The Court: No. The question is "solely".

The Witness: I can't answer that because I don't pass on them. I don't understand.

* * * * *

[T. 135] The Court: ... Will you repeat your question to him that originated this inquiry, namely, whether or not the construction loans or these loans were made on other than the appraised value of the property?

The Witness: I would say they were made on the appraised value of the property.

By Mr. Batchelor:

Q. And that alone? A. Yes.

Mr. Batchelor: Thank you, Your Honor.

* * * * *

[T. 144] Q. Can you state whether or not your procedure with respect to Reynolds Construction Company which I understand was a borrower from the bank at that time was any different from your procedure with respect to any other borrowers? A. No different, sir.

* * * * *

Q. Can you state whether or not on monthly payments of mortgage loans the passbook was returned to the company, to the Savings and Loan Association? [T. 145] A. I could not. I do not handle that part of phase of the work at all. That is done through the tellers.

Q. Are you unable to testify as to the practice of the Savings and Loan Association with respect to the receipt of payments on mortgage loans? A. Well, I can briefly. That is about all.

Q. I don't want you to tell me anything that you don't know about. I would just like to know whether you possess knowledge, your own personal knowledge with respect to the procedure for receiving monthly payments on

mortgage loans? A. Well, most of the payments are made by the passbook payment books sent in and the payment slip.

Q. How is it processed and by whom? A. This is processed by the tellers in the bookkeeping department.

Q. Are the tellers in the bookkeeping department under your jurisdiction? A. No, sir, I don't have nothing to do with that.

Q. Under whose jurisdiction is that? What office of the bank? A. They come under the comptroller.

Mr. Bridgeman: Thank you. That's all I have.

The Court: Do you have redirect?

[T. 146] Mr. Molenof: Yes, just one question.

Redirect Examination

By Mr. Molenof:

Q. Mr. Stoy, is any application of a loan or for a loan considered initially if it's found to be predicated on a false sale or information contained therein, and particularly in 1962 and 1963? A. No, sir, we would not.

Mr. Molenof: That is all.

The Witness: We would not, certainly.

The Court: Do we understand from your testimony, Mr. Stoy, that in 1962 and 1963 that Eastern Savings and Loan in making permanent loans after construction loans, acted solely on the papers submitted to it?

The Witness: Yes, sir.

The Court: And it had no personal contact with the borrowers?

The Witness: Yes, sir.

The Court: All right.

Recross-Examination

By Mr. Dillon:

Q. Now, Mr. Stoy, if I told you that Reynolds Construction Company had borrowed between \$4 million and \$5 million [T. 147] in 1964 and 1965 and 1966 from East-

ern Savings and Loan, would that refresh your memory?

Mr. Molenof: Objection. I don't see the materiality of the question.

The Court: He may answer the question if he knows.

The Witness: I would say somewhere in that neighborhood. I can't say the exact figure, no, sir.

The Court: Any further questions?

Mr. Warner: Yes, Your Honor, I would just like to ask Mr. Stoy just one other question.

By Mr. Warner:

Q. Mr. Stoy, are you familiar with any times in which the Eastern Savings and Loan Association permitted property on which it had a loan to stand in the name of someone other than the real party in interest, the real owner, and not a straw? A. Not to my knowledge, no, sir.

Q. Not to your knowledge? A. Not to my knowledge.

The Court: You may step down, Mr. Stoy.

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[T. 489] Q. [By Mr. Molenof]: Now, with respect to your analysis of the settlement sheets that were submitted to Eastern Building and Loan [T. 490] Association by Leigh and Rogers and the settlement sheets that were submitted to Reynolds Construction Company by Leigh and Rogers—I will ask you were they similar? A. No, they were not. There were differences in the settlement sheets.

Q. I specifically direct your attention to 12 settlement sheets: Peter Viek, Robert Oppenlander, Torrey Macilveen, Gurfein, Phillip G. Hammer, Byron J. Hays, Jr. There is no name here, Lot 64, Section 2, Potomac Hills, Fairfax County, Virginia. Richard T. Lyons, John J. Boesel, Ralph E. Schwartz and William R. Berry. I will ask you with respect to those settlement sheets, what did the settlement sheets to Eastern Building and Loan Association reflect? A. The settlement sheet to Eastern Savings and Loan reflected the purchase by these various individuals of the properties involved.

Q. What did the settlement sheets that went from Leigh and Rogers to Reynolds indicate, the corresponding sheets? A. The settlement sheets that went to Reynolds reflected the disposition of the amount that was obtained from Eastern through a mortgage on the various properties.

Q. Did it deal with the sale and the purchase, or just the mortgage? [T. 491] It dealt with the disposition of the amount of the mortgage itself that was obtained.

Q. Do you mean the loan money? A. The loan money, yes, sir.

Q. Was there any further reflection? A. Yes, it also reflected payments for straw services and payments for a finder's fee in each instance.

Q. And they were not reflected on the ones to Eastern? A. No, they were not reflected on the ones to Eastern.

Q. The ones that went to Reynolds Construction Company from Leigh and Rogers, what did they reflect with respect to disposition of funds that were not shown on the ones to Eastern? A. Would you please restate that, sir.

Q. With respect to the finder's fee, was that reflected on the one to Eastern? A. No, sir, it was not.

Q. Did it indicate on the ones to Reynolds who the finder's fee went to? A. In some instances, it did, yes, sir.

Q. Who did it go to? A. R. Marbury Stamp.

Q. With respect to the settlement sheets in the instances that it did not indicate who the finder's fee went to, did you [T. 492] make further inquiry to determine just who they went to? A. Yes, I did.

Q. Who did they go to? A. R. Marbury Stamp.

Q. In what amounts of money, sir? A. They were one percent of whatever the amount of the loan was. In most instances it was a loan of \$35,000, and there was a check for one percent, \$350.

Q. Now, with respect to the straw services, did you make any inquiry to determine how much was reflected in the straw services? A. Yes, in each instance it was \$200.

Q. Did you make inquiry to determine just who received the monies for the straw services? A. Yes, I did.

Q. What did your inquiry reflect? A. That disclosed that the \$200 payments for straw services went to Harlan E. Freeman.

Q. With respect to the settlement sheets that went to Eastern, were there any charges by Leigh and Rogers for title searching? A. Yes, there was.

Q. How much did they amount to? [T. 493] A. I would have to see the individual settlement sheets, sir.

Q. The ones that went to Reynolds Construction Company, were there any charges there in similar transactions for the searching of the title? A. Yes.

Q. For the searching of the title? A. Yes.

Q. I will show you those here. A. In some instances there were amounts indicated. In some, the amounts were not indicated.

Q. Was that for searching and title or were they for fees? A. Run down and closing, attorney's fees for preparation of papers, etc.

Q. There was nothing, no charges for examination of title in any of those that went to Reynolds, were there? A. No, sir, there was not.

Q. Was there any indication in these settlement sheets just how much went to the Reynolds Construction Company? A. Yes, there was, sir.

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[T. 531]

Thomas R. Harrison

was called as a witness and, after being first duly sworn, was examined, the [sic] testified as follows:

Direct Examination

By Mr. Molenof:

Q. Mr. Harrison, would you please state your full name and occupation to the Court and the jury, please? [T. 532] A. Thomas R. Harrison, I am President of Eastern Savings and Loan Association.

Q. What did you say? A. President of Eastern Savings and Loan.

Q. Were you with Eastern Savings and Loan Association in the years 1962 and 1963, sir? A. Yes, I was.

Q. Now, with respect to the application for loans, what was the policy of Eastern Savings and Loan Association in 1962 and 1963, with respect to the extension of a loan based on a false sale of property and containing false information? A. We had no policy. We would not make any loans based on false information.

Q. In other words, where false sales and false information, would you even consider the application? A. No, sir.

Q. Now, where a construction loan, sir, is already on a particular property and submitted to you, are sales contracts and an application for a loan on that property by the purported prospective purchaser, what was the policy of the bank in 1962 and 1963, with respect to their procedures in dealing with the particular application for a loan; that [T. 533] is, after you received those initial documents? A. After we received the application, as you say, a copy of the contract, we would submit the address and information for the request for a loan to an appraiser who would go out and appraise the real estate to see if the value was sufficient to justify the making of the loan in that amount? If he agreed that the valuation was there and would make a recommendation of a loan, then we would have a meeting of the loan committee which usually consisted of two or three senior officers who would then recommend a loan to the executive committee. The executive committee would approve that loan subject to the Board of Directors' final approval.

Q. Where the application would be submitted by an agent of the applicant for the loan, what would be the next procedure after? A. Well, the—once the loan was approved by the executive committee, it was necessary to notify someone of the approval. We would notify whoever made the application, sent us in the application. If

it were the agent for the buyer, it would go to him. If it were the borrower, it would go to the borrower himself.

Q. When you sent it to an agent, that would be for the purpose of notifying him for the further notification [T. 534] of the borrower? A. That is correct.

Q. What would happen there after you send that application through? A. Well, I think you mentioned here it came through an agent, when the agent receives our notice that the loan was approved for a certain amount, then he presumably would notify the borrower that the loan was approved and he would set up a time for settlement with a title lawyer who would notify us he was doing the title search and send us a preliminary binder.

Q. Is a title lawyer the same as a settlement attorney? A. Settlement lawyer, title lawyer, yes.

Q. Then what else would be done after you get the binder? A. On the receipt of the preliminary binder from the settlement attorney, he would set a date for the settlement and send us the information as to how to prepare our papers, giving us the name of the borrower and their relationship and a description of the property so we can complete our papers. So the papers would be prepared at our office and then sent to him for signature and execution.

Q. Now, what papers would there be, sir? [T. 535] A. That we would send?

Q. Yes. A. Well, they have to prepare a deed of trust that secures us the property, he would sign, and he would have to send him a note which he would execute, there would be a passbook that he delivered to the borrower, there would be a notice of payment, there would be an agreement whereby he agrees to accept the loan and the terms which were stated, there would be a copy of the settlement sheet telling them how much our construction loan was that was going to be paid out of the proceeds of this loan.

I think basically that is the documents.

* * * * *

[T. 543] By Mr. Dillon:

Q. For what years do you have the balance sheets in your file of the Reynolds Construction Company?

The Court: Same objection.

Mr. Dillon: May I approach the bench, Your Honor?

The Court: It is not necessary.

By Mr. Dillon:

Q. Mr. Harrison, you testified from time to time Reynolds Construction Company filed balance sheets and financial [T. 544] statements and you did on occasion refer to them? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Mr. Molenof: I'll object to that line of questioning.

The Court: Sustained.

By Mr. Dillon:

Q. When you examined the documents, financial statements, submitted to you by Walter Reynolds, do you recall the worth of Mr. Reynolds was in 1961?

The Court: I sustain all objections to this line of questioning.

Mr. Dillon: May I approach the bench, Your Honor?

The Court: Yes, sir.

(At the Bench)

Mr. Dillon: Your Honor, we had intended that we can prove that Eastern Savings and Loan Association knew these were straw transactions and to back up their giving of these loans, they knew that Walter Reynolds stood by them, that Walter Reynolds was worth \$1 million or \$2 million dollars, far in excess of the amount of the loan. I am attempting to get in this record through the testimony of this [545] witness—

The Court: You can recall him for the defense's case. I am not forcing the Government to try the defense's case

in the prosecution's case. Call him if you want to if it is relevant. He is available to you.

Mr. Dillon: Yes, sir.

(In Open Court)

By Mr. Dillon:

Q. Mr. Harrison, did you have any conversations with regard to this case on last Friday?

Mr. Molenof: I object.

The Court: Sustained. Come to the bench.

(At the Bench)

The Court: Your questions can only be proper in the event he testifies to something that contradicts something that Mr. Stoy had said. Mr. Molenof never went into this. He testified according to what his—

Mr. Dillon: I believe he did. He testified they made loans on the basis of appraisals.

The Court: This witness never said anything to contradict him.

Mr. Dillon: If he knew they were false, they wouldn't make a loan. That is a direct contradiction, [T. 546] Your Honor.

The Court: Mr. Molenof didn't open it up.

Mr. Dillon: Your Honor, I certainly indicate this witness was influenced by the discussion of the testimony before this Court with Mr. Stoy. Now, his testimony is different than Mr. Stoy in that respect Mr. Stoy said appraisals. That is why we made the loan. By inference, the jury is clearly led to believe that had they known of these things, they would have made no loan. I think it is direct contradictory.

Mr. Molenof: No contradiction for the simple reason that Stoy made a particular statement on rebuttal, and I have the transcript here, indicating they initially considered the application not knowing they contained false information or false sales—

Mr. Dillon: That contradicts Mr. Stoy's testimony.

Mr. Molenof: It didn't contradict his testimony. He would not make a loan on false sales and false information. I don't think he contradicted him.

Mr. Batchelor: Your Honor, may I say he testified, and there was a general question as to what specific testimony related to the property, and that has never been touched. [T. 547] The Court: It certainly hasn't. He has never been asked any question about any knowledge of any one of the 17 transactions.

Mr. Ahearn: I got the same inference out of the question.

The Court: I can't help it. It might be an inference from a million other properties. The whole examination, the principal examination of this witness had to do with general practice of Eastern Savings and Loan, and not once did he testify to the 17 transactions. If he had, I would permit as indicated some challenge to the question as to his credibility. He has not gone into it. I will not permit it. I will stand on my ruling.

(In Open Court)

Mr. Dillon: I have no further questions, Your Honor.

* * * * *

[T. 550] The Court: In 1962, 1963, to your knowledge, what factors would have been considered? If you had a series of transactions and this showed up in your records, what would you have considered?

The Witness: Well, we would consider, number one, the availability of funds, what the going rate is on the market, the matter of cash that people are putting in, the purchasing, their credit rating, and their credit risk, whether it was a good loan, and we could lose the loan to someone else for a lower interest rate. In other words, a purchaser comes and says, "I am going to assume your loan if you will reduce the interest. If you don't, we will get our loan somewhere else at a lower interest." Competition might force us to reduce our rate by a half a per cent. It is a matter of competition.

* * * * *

[T. 551] The Court: Yes. Suppose a builder who was building a thousand homes, and he got his construction money, most of it from your institution, would that fact have any influence upon the subsequent mortgages, final mortgaging on the property?

The Witness: If a builder were building a group of houses and we had making loans at five and a half per cent or six per cent—let's use the six, we had been making loans on final houses at six per cent, a builder might bring us a contract and say, I have a purchaser who will get his own loan at five and a half per cent unless you make it five and a half, and we would like for you to keep it, and as a result, we would say, we will make it five and a half. This does happen and has happened.

* * * * *

[T. 553] Q. What effort, if any, did you make, Mr. Harrison, or did your bank make to assure that loans were not made by false information?

Mr. Molenof: I object to the question.

Mr. Bridgeman: It is an inquiry into the practice.

The Court: Objection overruled.

The Witness: You better state the question again. Let me see if I am sure what you mean.

Mr. Bridgeman: Would the reporter read the question.

(Question read.)

By Mr. Bridgeman:

Q. This is as to 1962. A. Well, sir—well, of course, it would depend on the source the loan [sic] were from, number one. As far as making a loan to insure the information was correct, if it were an application that was submitted through an agent, and we had been doing business with the agent, we probably would accept the information that was submitted without too much verification. [T. 554] If we didn't know the people involved, possibly we would make a more detailed review of it. As you know, stated earlier papers were not signed in our office. They were

sent to the settling attorney and which place they were signed. We never met the people before the sale. They didn't come in the office or anything. I don't know whether that answers your question or not.

Q. What, if anything—strike that question.

Can you state whether the interest rate was that was generally charged in the fall of 1962, to individual home buyers by the Eastern Savings and Loan Association?

Mr. Molenof: Object, immaterial.

Mr. Bridgeman: Again, it is a matter of practice, Your Honor.

The Court: The objection is overruled.

The Witness: I can't answer that question, because I don't know what the going rate was in 1962 or 1963. I have no way of knowing. I would have to go back to check my records to see what we were making on loans at that time.

By Mr. Bridgeman:

Q. Well, is it not true, Mr. Harrison, you made a different rate for a loan and a different rate to builders, home builders than you did to individual home buyer or buyers? [T. 555] A. Now, are you talking about construction loans to the builder, would it be more than the other loans, finished loans?

Q. Yes, that is one aspect of it. A. I would say that the loan to the builder was at a higher rate than a loan to the ultimate purchaser.

Q. Then normally, for example, if you had in 1962, a construction loan at six per cent, the loan rate to the home purchaser would have been at a lower rate?

The Court: We are talking about two different kinds of loans, Mr. Harrison.

The Witness: Yes.

The Court: Let's not confuse the jury.

Mr. Bridgeman: No, sir, I am trying to make the distinction.

The Court: Mr. Harrison, is there a distinction between a construction loan and first trust financing?

The Witness: Yes, there is.

The Court: In 1962 and 1963, was it the practice of Eastern along with other institutions in this field to charge a higher rate of interest for construction money than for permanent financing?

The Witness: Yes, I think that is correct.

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[T. 556] By Mr. Bridgeman:

Q. Was it your practice in 1962, Mr. Harrison, to permit construction companies to sign their own completion bond? A. Yes, sir, depending on the company involved or the builder involved, yes, sir.

Q. Could you state, perhaps, what was a completion bond for the information of the jury? A. Well, when you make a construction loan, there is more risk involved, because you are going to disbursing the money [T. 557] over a period of time as the work progresses. A lender on that type of a loan wants some security or guarantee it will be built in accordance with the plans and specifications and finished. So to get a completion bond, in some instances, they are signed by material men who furnish it. It is possible to get a commercial bond but it is very seldom used. If a builder has been doing business with you for a long time and has proven his ability to build and complete in accordance with it, we would take a completion bond by him, the individual.

Q. This was the practice of Eastern Savings and Loan in 1962, with respect to Reynolds Construction Company? A. Reynolds Construction Company, as the company made the loan. The corporation made the loan and then Walter R. Reynolds and I think his wife, as I recall, individuals, signed the completion bond.

Mr. Bridgeman: Thank you. I think that is all I have.

The Court: Mr. Deitz?

Cross Examination

By Mr. Deitz:

Q. Mr. Harrison, isn't it a fact back in 1962, 1963, and 1964, Eastern Savings and Loan Association and any other savings and loan association was not required to check out the credit information that was on those applications? [T. 558] A. This would be an individual matter with the association as to what policy they had adopted. Some associations did even require a credit report of any kind at the time to be submitted. Some associations not only required a report to be submitted, but they also got a commercial report. Other associations and Eastern would be included required a credit report, but did not verify or check. This was a matter of information kept on file so that at some time in the future we could refer to it at the time a loan was being considered, the Executive Committee would always check to see if we had a report and see what it contained and to see if a man's job was the same and he carried the house or something like that. We did not check it out to verify the facts on it.

Q. Isn't it also a fact that Eastern had and particularly Eastern's president at the time, I believe his name was Mr. Payne, was particularly concerned with the appraised value, what your appraiser said this property was worth in determining the amount of the loan? A. Well, Mr. Payne who was President at that time and I, as President at this time, am most interested in the fact that we get a qualified appraiser to appraise the house and put a value that would justify the loan. Under no circumstances would we make a loan if a qualified appraiser didn't appraise it to [T. 559] justify it.

Q. The reason for that is that Eastern looked to the property itself, is that correct? A. That is correct. Primarily the first thing to be looked at is the real estate involved.

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[T. 568]

Ernest Nizer

was recalled as a witness and was examined and testified further as follows:

Direct Examination

By Mr. Molenof:

Q. Mr. Nizer, you have previously testified in this case, sir. A. Yes, sir.

[T. 569] Q. Now, as a result of your examination of the records in this case that you received through the Grand Jury, can you tell me just how much money Freeman got in the form of checks from Leigh and Rogers for these particular transactions? A. Yes, sir.

Q. How much, sir? A. Mr. Freeman received \$2,400.

Q. Can you tell me how much the defendant Stamp received? A. Mr. Stamp received \$6,075.

Q. Did you make an examination of the settlement sheets that went to Eastern to determine just how much the defendants Leigh and Rogers were paid as a result of title searching in this particular case? A. Yes, sir.

Q. How much was that, sir? A. According to the settlement sheets that went to Eastern, Leigh and Rogers received \$4,754.

Q. Now, I will ask you, sir, did you determine just how much by way of construction loans that were paid off by Reynolds as a result of these loans? A. Yes, sir.

Q. How much was that, sir? [T. 570] A. \$481,882.34.

Q. Were there any second deeds of trust? A. Yes, there were.

Q. How much were liquidated in second deeds of trust? A. \$48,070.65.

Q. Did you make a determination just how much over and above the payments and liquidation of these loans did Reynolds receive? A. Yes, I did. Reynolds received \$50,712.44.

Q. Were all of those payments shown in the form of checks from Leigh and Rogers? A. Yes, sir.

Mr. Molenof: No further questions.

The Court: Mr. Dillon.

Cross-Examination

By Mr. Dillon:

Q. Mr. Nizer, did you compute the total amount of interest that Eastern Savings and Loan received from the documents you had in your possession?

Mr. Molenof: Objection.

The Court: Do you want to come to the bench.

(At the Bench.)

Mr. Dillon: Your Honor, the purpose of my question [T. 571] is to back up the theory of our case, namely, that Eastern Savings and Loan didn't give something for nothing. These defendants are accused of obtaining money by false pretenses. We are claiming that the evidence will show that Eastern Savings and Loan had an incentive for converting the construction loans into permanent loans, and that that incentive was \$121,883.09 as shown on the documents before that Grand Jury, the same documents that Mr. Nizer is testifying about that he has analyzed.

The Court: Let's keep it in the defendants' case. We can't try both the defendants' and prosecution cases at the same time, can we, counsel? Sometimes you can in a simple case, but you can't do it in this one.

The theory of your case individually or collectively, if we get to that point, ought to be presented in the fashion so the Court and jury can follow it. I am not going to permit you to go outside of the scope of direct examination, the same as I prohibited it during the other witnesses.

I am not saying it might not be relevant and material to your defense, but certainly it is not appropriate at this point.

(In Open Court.)

Mr. Dillon: I have no further questions.

[T. 572] The Court: Mr. Bridgeman.

Mr. Bridgeman: One question, Mr. Nizer.

By Mr. Bridgeman:

Q. You referred to \$481,000 in construction loans paid off. It's a fact, is it not, that these were amounts that Eastern Savings and Loan paid to itself? A. That is correct.

Q. It was merely a book transaction? A. No. It paid off a construction loan and became a conventional loan.

Q. Who had made the construction loans to Reynolds Construction Company? A. Who had what?

Q. Who had made the construction loan to Reynolds? A. Reynolds had made the original construction loan, that is correct.

Q. Who had made the loan to Reynolds, the original construction loan? A. Eastern had made the original construction loan to Reynolds.

Q. And it's a fact, is it not, that when Eastern made these new loans, it repaid itself for the construction loans it had previously made to Reynolds? [T. 573] A. That is right, it liquidated the construction loan.

Mr. Bridgeman: Thank you, sir.

By Mr. Ahern:

Q. Mr. Nizer, you were asked the question about each defendant and what monies they received from an examination of the records. In connection with those records, what monies were paid to the defendant Dienelt from an inspection of those records? A. I didn't determine any payments to Mr. Dienelt.

Q. Well, as a matter of fact, there are no payments reflected on those records, isn't that right? A. That is correct.

Mr. Dillon: One last question, Your Honor.

By Mr. Dillon:

Q. These amounts of money that were paid to Reynolds, I believe you testified a little over \$50,000. In fact, wasn't

that money paid to Reynolds Construction Company and not to Walter Reynolds as an individual? A. That is correct.

Mr. Dillon: Thank you.

The Court: Mr. Batchelor.

By Mr. Batchelor:

Q. Mr. Nizer, the figures that you gave with regard to [T. 574] Leigh and Rogers represented the charges for the various services on the settlement sheets that the attorneys performed? A. That was the examination of title on the settlement sheets that went to Eastern.

Q. Did that figure that you gave reflect solely the fees? A. It was on the settlement sheet as examination of title.

Q. That is where it came from? It didn't come from anything else? A. That is correct.

Mr. Batchelor: All right.

By Mr. Dietz:

Q. Mr. Nizer, the figure that you quoted as income of Mr. Stamp amounted to one percent of the amount of loans, did it not? A. That is correct.

Q. No more, no less? A. That is correct.

Mr. Dietz: That is all.

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[T. 592] By Mr. Batchelor:

Q. Mr. Nizer, yesterday you were going to make an examination into the records concerning the Payne transaction with reference to a reduction of interest. A. That is correct.

Q. Did the records reflect that the interest rate on the Payne assumption reflect a reduction of interest from six percent to five and a half percent? A. I think it was five and three-quarters percent.

Q. All right, sir. But it did reflect that reduction? A. Yes, sir.

Mr. Batchelor: Thank you very much.

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[T. 598] Mr. Dillon: Ladies and gentlemen of the jury, all of the defense counsel and the prosecutor have agreed to the following:

The defendant Reynolds will stipulate that in 1962 and 1963, he and his wife jointly owned 50 percent of the stock of Reynolds Construction Company, and that the other 50 percent of the stock was owned by Albert Shaw, Jr., and that the 1962 Income Tax returns filed in behalf of Reynolds Construction Company showed a loss of \$112,508.28.

Thank you, Your Honor.

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[T. 642] The Court: May I ask the Government why he didn't bring the loans in—

Mr. Burns: Bring the loans in?

The Court: Stoy testified he didn't know anything about any particular transaction, he was an officer, he was the keeper of the record. Is that correct?

Mr. Burns: I am not sure right now his exact title at that time.

The Court: Whatever it was, he did not purport to speak with any personal knowledge with respect to how these 17 loans made by each who did it. He only purported to speak insofar as keeping the records of which were in his custody, indicated the loans were made, isn't that correct?

Mr. Burns: Your Honor, I believe that he spoke with personal knowledge as to whether he was on the committee or not. I don't recall, although it could be—

The Court: Does the Government contend that any of the information that you have here, that people acted upon these applications?

Mr. Burns: I believe we have heard from them.

The Court: Who was it that said he was on the loan committee and he attended a meeting and he made a [T. 643] recommendation to the executive committee, and he was on the executive committee that recommended to the Board of Directors. That was your President that was brought in here said was the procedure, that the loan committee proc-

essed the loan and made a recommendation to the executive committee, if I remember the testimony correctly, and the executive committee made a recommendation to the Board for the final approval of the loan. Is that correct?

Mr. Burns: That is correct.

The Court: Somebody acted on those 17 loans in this case, is that true?

Mr. Burns: That is correct, Your Honor.

The Court: Where are they? Where are the people that dealt with these transactions?

If they are dead, the Government ought to say so. If they are in Viet Nam, the Government ought to say so.

Are you in a position to advise the Court why they were not here?

Mr. Burns: Right now, I am not sure that Stoy was not one of those persons. Mr. Harrison, I believe, was. The question wasn't asked of him with respect to these transactions.

[T. 644] The Court: If Mr. Harrison was the person involved in 1962, pray tell why you didn't ask him about these specific transactions?

Mr. Burns: I cannot answer the question. I can't answer why the question was not asked.

The Court: I don't understand the Government's way. Maybe I will.

* * * * *

[T. 650] [Mr. Burns, outside of the jury's presence]: With respect to the knowledge of the officers of the bank which defense has raised, an additional point I would make, that we believe the evidence shows that the bank did not have knowledge that they would not have granted the loans had they known of the situation of the circumstances surrounding the loans.

If it were proven that, say, Mr. Harrison or officials of the bank knew, then the Government would merely [T. 651] take the position that these men were unindicted coconspirators and would not affect the case against the defend-

ants, because they would still—Eastern Savings and Loan Association is an unincorporated association, and it would still be a fraud upon the shareholders of Eastern Savings and Loan.

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[T. 658] [Mr. Burns, outside of the presence of the jury]. In his pointing out the invalidity of the security interest, deed of trust in this case, and with [T. 659] respect to the unindicted coconspirators, my reference to that, I am not saying there were unindicated coconspirators, I am certainly not intending to take the position now inconsistent with my earlier papers submitted by the Government in this case.

My theory in the case has been from the start, I believe, and is now that Eastern Savings and Loan had no knowledge of the transactions as they were actually taking place. I merely noted now that, and even if it turned out we were wrong in that respect, it would not be a defense. It would only show the officials who did have knowledge to be unindicted coconspirators. I am not saying that they are unindicated coconspirators.

* * * * *

[T. 662] The Court: Very well. At the close of the last day of this trial the Court took under advisement motions by all defendants for judgment of acquittal at the conclusion of the Government case.

All counsel is well aware of the fact that in making a determination on this motion, the Court is bound by the law in this circuit. Counsel also recognizes that in that regard this circuit differs somewhat from other circuits. But with respect to the law in this circuit, it was set forth rather clearly by Judge Prettyman as early as 1947 and has not been changed since.

It was the Court's responsibility to consider all of the evidence both the testimony and the documentary evidence to determine whether upon that evidence and giving, as the Curlee opinion states, full application to the right of

the jury to determine the credibility of witnesses and to weigh the evidence and draw justifiable inferences from that evidence, whether a reasonable person must have a reasonable doubt [T. 663] as to the guilt of the defendants in connection with the indictment.

Now, it is the judgment of this Court that the Government at this stage of the proceeding has produced sufficient evidence to sustain a conviction and that the evidence is capable and sufficient to persuade a jury to reach a verdict of guilty beyond a reasonable doubt under this Curlee standard. Therefore, I do not conclude that there must be a reasonable doubt in the mind of reasonable persons as to the guilt of the defendants.

I have considered, as I indicated, the full transcript, the testimony of all witnesses who have testified in the course of this trial, as well as the documentary evidence which has been admitted, some over the objection of individual counsel, most without objection.

Under those circumstances, the motion for judgment of acquittal at the end of the Government's case is denied as to each defendant.

* * * * *

[T. 673]

Thomas R. Harrison

was re-called as a witness and was examined and testified further as follows:

Direct Examination

The Court: You may proceed, Mr. Dillon.

By Mr. Dillon:

Q. Mr. Harrison, I believe you have already appeared as a witness in this case and have been sworn. Is that true? A. Yes, sir.

Q. Could you state just once again your position? A. President of the Eastern Savings and Loan Association.

Q. How long have you been employed by Eastern Savings and Loan Association? A. Thirty-five years.

Q. Do you know the defendant, Walter Reynolds? A. Yes.

Q. How long have you known the defendant, Walter Reynolds? A. About 12 years. About 1957, I believe, we started doing business with him.

Q. Do you know other people who know Walter Reynolds? A. Oh, yes, a great many.

[T. 674] Q. Among these other people can you tell the jury what the reputation of Walter Reynolds is for truth and veracity? A. Excellent.

* * * * *

[T. 676] **Harlan E. Freeman**

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bridgeman:

Q. Would you state your name and address for the record, Mr. Freeman? A. Harlan E. Freeman, Vienna, Virginia.

Q. You are one of the defendants in this case? A. I am.

Q. Can you state by whom you were employed in July of 1962, Mr. Freeman? [T. 677] A. By Reynolds Construction Corporation.

Q. In what capacity were you then employed? A. Secretary of the corporation.

Q. Who was the president of the corporation at that time? A. Walter R. Reynolds.

Q. Who signed your pay checks at that time? A. Walter R. Reynolds.

Q. Now, in or about July of 1962, did you know your co-defendant, R. Marbury Stamp? A. Yes, I did.

Q. Did you then know what Stamp's primary business was? A. A mortgage loan broker.

Q. Did you have any occasion to communicate with Mr. Stamp in July of 1962? A. I believe in July of 1962 I

wrote a letter to Mr. Stamp to be signed by Mr. Reynolds requesting that he procure about 30 or 35 construction loans for a new addition to Potomac Hills.

Q. Can you state whether or not there was any specific lending institution referred to in that letter? A. No specific lending institution was referred to in that letter.

* * * * *

[T. 681] By Mr. Bridgeman:

Q. Mr. Freeman, did you have occasion at any time in July 1962 to have any discussions whatever with Mr. R. Marbury Stamp? A. I believe I was present at a discussion between Mr. Stamp and Mr. Reynolds concerning the construction loans which we had requested.

Q. Just so the Court and jury can be clear, can you state what the substance of the discussion was, and please make specific reference to what you refer to as construction loans? A. The discussion centered around the fact that Mr. Stamp had applied for the loans to Eastern Savings and Loan Association.

Mr. Burns: Objection, Your Honor.

The Court: Overruled.

[T. 682] The Witness: And that Eastern Savings and Loan Association would not grant the loans which totaled roughly \$1.5 million until Mr. Reynolds got some 15 or 20 houses out of the name of Reynolds Construction Corporation.

Mr. Burns: Your Honor, I object.

The Court: Come to the bench.

(At the Bench.)

The Court: I think you got problems.

Mr. Bridgeman: In what respect, Your Honor?

The Court: In what respect? Mr. Burns, state the basis of your objection.

Mr. Burns: I object, Your Honor, because the testimony is irrelevant.

Mr. Bridgeman: The testimony is the essence of the case, Your Honor.

The Court: Wait, one moment, counsel. Let the Government state its objection.

Mr. Burns: The knowledge of an official of the bank has no bearing in the case. The knowledge of an official and the theory, as I expressed yesterday, that does not negate the defrauding of the savings and loan association.

The Court: What kind of knowledge? What are you talking about?

Mr. Burns: The knowledge, well, they are raising the [T. 683] point that a member, an officer of Eastern Savings and Loan suggested this transaction. My point is that that doesn't affect the guilt.

The Court: The problem that I have with it is that it is rank hearsay. It is rank hearsay. We are not talking about a conversation between officials of the bank and Stamp or something. You are talking about a conversation allegedly between these defendants themselves.

Mr. Bridgeman: No, sir. I suggest it is not hearsay in this context, for this reason: That the only reason that this is being put on is to show Freeman's intent or belief or state of mind. This testimony does not relate to anything except what Mr. Stamp said. It does not go to the truth of what he said. But it goes to the issue whether this is what Freeman heard. That is, the truth of any statement that may have been made is not an issue so far as I am concerned. I am simply putting this evidence on to show that Freeman heard this and acted on that hearing. It has nothing to do whatever with the truth of what Stamp said or the truth of what anybody at Eastern Savings and Loan might have said.

The Court: I think you are quite right. I think you are quite right. Your objection is overruled.

(In Open Court.)

Mr. Bridgeman: Your Honor, I think that the witness was in the middle of an answer. I wonder if the reporter

[T. 684] could read it back and then we could have the witness pick up.

(The record was read by the reporter.)

The Witness: My understanding of what Mr. Stamp told Mr. Reynolds was that with the knowledge and with the concurrence of Eastern Savings and Loan, we were to straw these houses out.

By Mr. Bridgeman:

Q. Was there any further discussion with Mr. Stamp at that time that you can recall on this subject? A. No, sir.

* * * * *

[T. 685] By Mr. Bridgeman:

Q. Mr. Freeman, prior to July 1962, can you tell the Court and jury whether you had any knowledge or information about any relationship between Mr. Stamp and the Eastern Savings and Loan Association? A. I knew that he did a considerable amount of business with them and was on very friendly terms with them.

Q. How did that come to your attention? A. I think I accompanied Mr. Stamp to Eastern Savings and Loan Association on another transaction at one time.

Q. Now, after the Stamp-Reynolds-Freeman conversation respecting straws to which you previously referred, what action, if any, did you previously take with respect to these construction loans? A. I am not sure I understood your question.

Q. After the discussion or conference to which you just referred, can you state what action if any you took with respect to the handling of these construction loans or to the later treatment of these construction loans? A. Well, I was instructed by Mr. Reynolds to find straws.

[T. 686] Q. Did you in fact do so? A. I found Mr. Rees and Mr. Rogers, and thereafter I ran up against a blank wall.

Q. When you say you ran up against a blank wall, can you explain in more detail what happened? A. I couldn't find anyone else willing to act as a straw.

Q. Were you given reasons by anyone as to unwillingness to act? A. They didn't want to sign a \$35,000 note.

Q. What if anything did you do then? A. I started making them up.

Q. How did you make them up, Mr. Freeman? A. I would pick out a name at random out of the Harvard Alumni Directory.

Q. When you referred to the Harvard Alumni Director, is this the 1960 Harvard Alumni Directory such as the one that has been put in evidence in this case? A. I believe so, yes.

Q. How many names did you select, Mr. Freeman? A. I don't know the total number.

Q. What if anything did you do with those names? A. I made up a contract at the figure supplied by Mr. Reynolds. I put in the contract it was subject to a loan [T. 687] in the amount Mr. Reynolds wanted. I signed the contract in the names of the straws. I also prepared credit applications and then turned over those documents to Mr. Reynolds.

Q. Can you state what information if any you supplied to any other defendant in this case about the actions that you just described? A. I didn't say anything to any of them about it until the summer of 1964.

Q. What happened at that time, Mr. Freeman? A. At that time I was informed by Revenue agent Evangelist that he wanted to make a routine audit of my tax returns and he questioned me about the \$200 straw fees in the presence of Mr. Leigh, and I told him then that I had made up these names.

* * * * *

[T. 705] [Excerpt from Court's Charge to the Jury]: Now, this, as you were told at the outset of the case, is a multiple count indictment and as you obviously know from

having sat through the trial, it involves multiple defendants. You should give separate consideration and render separate verdicts with respect to each defendant as to each count of the indictment involving that defendant. Each defendant is entitled to have his guilt or innocence determined from his own conduct and from the evidence which applies to him as if he were being tried alone. And the guilt or the innocence of any one defendant of the crime charged should not in and of itself influence or control your verdict with respect to the other defendants.

I just said each defendant is entitled to individual consideration of the particular evidence applicable to him to determine whether that defendant participated in the alleged [T. 706] conspiracy. You cannot return a verdict in this case against any defendant unless you find specifically that that defendant conspired with one or more of the other defendants.

Now, with respect to the conspiracy count, which is count one of the indictment, as well as to the other counts of the indictment which contain the substantive counts involving the offense of false pretenses, the guilt or the innocence of each defendant with respect to the charge against him must be deliberated by the jury separately. Each defendant in this case has the right to that kind of a consideration on your part as if, as I indicated a moment ago, that defendant were being tried alone.

I further instruct you in this regard that you may return a separate unanimous verdict as to one defendant on the conspiracy count without returning any verdict with respect to other defendants on the conspiracy count because of your inability to unanimously agree as to the other defendants.

Now, certain evidence in the course of this trial was admitted only with respect to some defendants and not all, and you may consider such evidence only with respect to the defendant against whom it was offered or the defendants against whom it was offered, and you must not in that

connection consider it in connection with any defendant against whom it was not offered.

[T. 707] Now, with respect to the evidence in this case, you are instructed that the only exhibits in this trial which relate to the defendant, Walter R. Reynolds, are the contracts of sale, the deeds of trust, and the \$200 checks from the Reynolds Construction Company to the straw purchasers. You are instructed that all other exhibits received in evidence in this case were not admitted against the defendant, Walter R. Reynolds, and these other exhibits may not be considered against Reynolds on the conspiracy count unless and until you find that a criminal conspiracy existed and that Walter R. Reynolds was a knowing or conscious member of said conspiracy.

With respect to exhibit 7-A and 7-B as to the defendant Rogers, that is, the sales contract, application for loan and the credit statement, these are not admissible as to the defendants Leigh and Rogers and may not be considered by you with respect to those defendants, again, unless and until you find that a criminal conspiracy existed and that the defendants Leigh and Rogers were knowing and conscious members of such conspiracy. And further, unless you find such a determination beyond a reasonable doubt, you could not consider the sales contract, the application for loan and the credit statement against the defendants Leigh and Rogers except as I indicated for Exhibits 7-A and 7-B as to the defendant Rogers.

Now, with respect to the defendant Dienelt, the only [T. 708] exhibits in this trial which relate to that defendant are certain documents which were presented in connection with the testimony of the straws Saperstein, Berg, Ashby and Swett. You are instructed as a matter of law that all other exhibits received in this case are not admissible against the defendant Dienelt, since there was no evidence to establish any relationship or connection with the defendant Dienelt to all the other exhibits which were received in this case. They may not be considered by you

with respect to the defendant Dienelt on the conspiracy count, again, unless and until you find that a criminal conspiracy existed and that the defendant Dienelt was a knowing or conscious member of that conspiracy. You are further instructed as a matter of law that unless you find such a determination beyond a reasonable doubt, you should not consider all of the other exhibits other than those identified in this instruction against the defendant Dienelt in the conspiracy.

What is a conspiracy? As defined by statute, section 371 of Title 18 of the United States Code, it is the following: "If two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished as the law [T. 709] thereafter provides."

Now, the essential elements of the offense of conspiracy which is set forth in the first count of this indictment, a copy of which will be furnished to you when you retire for your deliberations, each essential element of which the Government must prove beyond a reasonable doubt, are as follows:

One. That two or more persons conspired to commit an offense against the United States.

Two. That a defendant knowingly participated in this conspiracy with intent to commit the offense which was the object of the conspiracy.

Three. That during the existence of this conspiracy at least one overt act was committed by one or more of its members in furtherance of the objectives of the conspiracy.

Now, the conspiracy here charged in the first count of this indictment is not one to defraud the United States or an agency thereof. The conspiracy that is charged in the first count of this indictment is a conspiracy to violate the forgery statute of the District of Columbia and the false pretenses section of the District of Columbia Code. And

a violation of either one of these statutes is construed as a matter of law to be an offense against the United States.

Now, a conspiracy is a combination of two or more [T. 710] persons to accomplish an unlawful purpose or a lawful purpose by unlawful means. While it involves an agreement to violate the law, it is not necessary that the persons charged have met together, entered into an express or a formal agreement or that they have stated in words or writing what the scheme was or how it was to be effected. It is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful purpose or a lawful purpose by unlawful means.

Such an agreement, that is, to violate the law by unlawful means or a lawful purpose by unlawful means, such an agreement may be inferred from the circumstances and the conduct of the parties, since ordinarily a conspiracy is characterized by secrecy.

Now, in determining whether a conspiracy existed, you should consider all of the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, you may consider only his own acts and his statements, and he cannot be bound by the acts or declarations of other participants unless and until it is established that a conspiracy existed and that he was one of its members.

But if you find and determine that a conspiracy as charged by the Government did in fact exist, that does not resolve the question of the participation of any one defendant [T. 711] in that conspiracy. You must still decide as to each defendant whether that particular defendant did in fact participate in the alleged conspiracy. And in determining whether or not a particular defendant did participate in the alleged conspiracy, you must decide solely on the basis of the evidence independently admitted against that particular defendant.

Ordinarily the law holds a person liable only by reason of his own acts and utterances. But where two or more persons combine to achieve an unlawful purpose, the acts and declarations of one during the existence and in pursuance of the conspiracy are held in law to be the acts and declarations of the others. But one person may be held responsible for the acts or utterances of others if and only if he and one or more other persons are acting in concert to a common unlawful purpose.

To be a member of a conspiracy, a defendant need not know all of the other members nor all of the details of the conspiracy, nor the means by which the objects were to be accomplished. But each member of the conspiracy may perform separate and distinct acts. But it is necessary that the Government prove beyond a reasonable doubt that a defendant was aware of the common purpose and was a willing participant with the intent to advance the purpose of the conspiracy.

It's not necessary in order to convict a defendant [T. 712] on a charge of conspiracy that he have been a member of the conspiracy since its inception or beginning. Different persons may become members of the conspiracy at different points in time.

Now, again, with respect to this count one charging conspiracy, each defendant in this case denies that he was a part of any illegal conspiracy. You are instructed that in addition to the elements of conspiracy which I have previously defined to you as being necessary for the Government to prove beyond a reasonable doubt in order to establish the existence of a conspiracy, you are further instructed as a matter of law that the Government must also establish beyond a reasonable doubt that a defendant, with a specific criminal intent as distinguished from a general intent, associated himself in a conspiracy with a specific intent to have the conspiracy accomplish its illegal purpose. And if from all of the evidence that you have heard in this case, including testimony from the stand and the documentary

evidence and stipulations, you have a reasonable doubt as to any such specific intent on the part of any defendant, it would be your duty to find that defendant not guilty. And if you had a reasonable doubt about this, it would be, again, your duty to give the benefit of that doubt to the defendant and find him not guilty.

Now, with respect to the defendant Dienelt, if you [T. 713] believe from the evidence that in July and August of 1962 he asked his employees whether they wanted to be straws for the defendant Reynolds, a former client, and if you further find from the evidence that said employees accepted this proposition and accordingly filled out papers facilitating this purchase, and if you further find from the evidence that the defendant Dienelt did so without being a part of any criminal conspiracy and did so as an accommodation to a former client without any guilty knowledge of the criminal conspiracy to do or participate in the commission of the acts which constitute false pretenses or forgery existed—then it would be your duty to find the defendant Dienelt not guilty, even though you found from the evidence that the actions of the defendant Dienelt did facilitate the conspiracy, if indeed you find from the evidence that a conspiracy existed, and it would be your duty to find the defendant Dienelt not guilty under these circumstances, since the Government would not have sustained its burden of proving beyond a reasonable doubt the knowing and intentional participation of the defendant Dienelt in a criminal conspiracy.

I have made frequent reference in the course of this instruction to the matter of intent. "Intent" means that a person had the purpose to do a thing, that he made an act of the will to do a thing, and that the thing was done consciously and knowingly and not inadvertently or accidentally.

[T. 714] Now, some criminal offenses require only a general intent, and where that is the case and it is shown a person knowingly committed an act which the law forbids

or which the law makes a crime, the intent may be inferred from the doing of the act. But each of the offenses with which these defendants here stand charged involves proof of a specific intent. Specific intent requires under the law more than the general intent to engage in certain conduct or to do certain acts.

A person who knowingly does an act which the law forbids intending with bad purpose either to disobey or disregard the law, may be said to act with specific intent. Now, "intent" can ordinarily not be proved directly because we just don't have any way of scrutinizing or fathoming the workings of the human mind. But you may infer as to a defendant's intent from all of the surrounding circumstances that you find from the evidence. You may consider any statement made or act done or omitted by a defendant and all the other facts and circumstances which are in evidence which indicate a defendant's state of mind. You may infer that a person ordinarily intends the natural and probable consequences of acts that he knowingly does or acts that he knowingly omits.

In that connection, an act is done knowingly if it's done voluntarily and purposely and not because of mistake or inadvertence or accident.

[T. 715] Now, with respect again to count one of the indictment charging all of the defendants with conspiracy, they are charged with a single conspiracy. If you find from the evidence that more than one conspiracy is shown to have existed and that such conspiracy had separate though similar objectives in which the participants in the different schemes were operating separately without an overall common design and purpose, then you must find all participants not guilty. If you have a reasonable doubt as to whether there is more than one conspiracy shown by the evidence, you must find such participants not guilty.

Now, if you find from the evidence that a conspiracy existed and that a defendant was one of its members, then the acts and declarations of other members of the con-

spiracy in or out of that defendant's presence done in furtherance of the objective of the conspiracy and during its existence may be considered as evidence against that defendant. This is so because when a person enters into an agreement for an unlawful purpose, they become agents for each other.

However, any statements of any conspirator which are not in furtherance of the conspiracy or are made before its existence or after its termination may be considered only against the person making them.

Again with respect to the defendant Dienelt, he [T. 716] cannot be bound by the actions and declarations of the other co-defendants in this case in connection with count one of the indictment unless you first find that the defendant Dienelt himself was a part of the conspiracy and aided and abetted and knowingly assisted with guilty knowledge in the conspiracy. And if from the evidence produced you do not find that the Government introduced evidence showing that the defendant Dienelt was aware of the conspiracy and aided and abetted in it, then you must find the defendant Dienelt not guilty. And if you have a reasonable doubt about this, you must find the defendant not guilty.

Now, it's not necessary that the purposes of the conspiracy have been accomplished, as I indicated a moment ago, or that a substantive offense which was the object of the conspiracy have been committed. It's not necessary that all of the overt acts charged in the indictment were performed. One overt act is sufficient.

Now, an "overt act" means any act committed by one or more of the conspirators to accomplish a purpose of the conspiracy. It need not be a violation of the law, and the other conspirators need not join in it or even know about it. It is necessary only that such act be in furtherance of the purpose or objects of the conspiracy.

If you find from the evidence in this case beyond a [T. 717] reasonable doubt that a conspiracy existed as charged in the first count of this indictment and that during

the existence of the conspiracy, one of the overt acts alleged in the indictment was knowingly done by one or more of the conspirators in furtherance of some object of the conspiracy, proof of a conspiracy offense is then met.

Now, you may return a verdict of guilty as to each defendant you find beyond a reasonable doubt to have been knowingly and willingly a member of the conspiracy at the time that the overt act was committed regardless of which of the conspirators committed the overt act.

One of the offenses charged against the defendants in the first count is the offense of forgery and uttering in violation of Title 22 of section 1401 of the District of Columbia Code. The essential elements of the offense of forgery, each of which the Government must prove beyond a reasonable doubt, are as follows:

1. That the writing in question was falsely made or altered by a defendant.
2. That a defendant so acted with specific intent to defraud.
3. That the falsely made or altered writing was apparently capable of effecting a fraud.

Now, with respect to establishing the first [T. 718] essential element of the offense, it's not necessary that the whole instrument have been falsified or altered but only that it have contained some material misrepresentation of fact.

With respect to the second essential element of the offense, it is not necessary that anyone have actually been defrauded or that a defendant have had the intent to defraud any particular person, either an individual or a banking institution. It is necessary that the defendant or a defendant have had the intent to defraud someone.

Intent to defraud is not to be presumed from the mere making of a false instrument. It may be found on the basis of some affirmative act, such as the passing of the false instrument or on the basis of other circumstances from which an intent may be inferred.

With respect to establishing the third essential element of the offense of forgery, it's necessary that the falsely made or altered writing have been reasonably adapted to deceive another person into relying on the writing as true and genuine. It's not necessary that the false writing have been accurate enough to deceive a bank. But if the false writing was such that no person of ordinary intelligence could reasonably have been deceived by it, then this element of the offense is lacking.

It is not necessary in connection with this element [T. 719] of the offense that anyone have actually suffered loss.

Now, with respect to the offense of uttering which is also charged in connection with the violation of Title 22, section 1401 of the District of Columbia Code, the essential elements of this offense are:

1. That the writing in question was falsely made or altered.
2. That the defendant or a defendant passed or attempted to pass the writing to someone representing it to be true and genuine.
3. That he did so knowing that it was falsely made or uttered.
4. That he did so with the specific intent to defraud.
5. That the falsely made or altered writing was apparently capable of effecting a fraud.

Now, the conspiracy, again, in this indictment is separate and distinct—I am talking about the first count of this indictment—it is separate and distinct from the remaining counts of the indictment, which are the substantive counts of the indictment, and there are 13 counts of the indictment. Count one is the conspiracy count, followed by 12 substantive counts.

Each defendant in this case is charged with the [T. 720] crime of conspiracy to commit forgery. Each defendant in the first count of the indictment is also charged with con-

spiracy to commit the crime of false pretenses in violation of Title 22, section 1301 of the District of Columbia Code.

Now, the essential elements of the offense of false pretenses, again, each of which the Government must prove beyond a reasonable doubt, are as follows:

1. That a defendant made a false representation to another person.

2. That a defendant at the time he made it knew that the representation was false.

3. That a defendant made the false representation with specific intent to defraud the person to whom it was made.

4. That the person to whom the false representation was made relied upon it.

5. That because of this reliance, the defendant or a defendant obtained from him something of value.

6. That the value of the property so obtained was in excess of \$100.

It's necessary that the false representation be of a past or a present fact. A false statement as to the future by way of promise or expectation does not constitute a false pretense. However, a false representation of past or existing fact, coupled with a false promise as to the future, may [T. 721] constitute a false pretense.

You may find that a defendant acted with intent to defraud if the evidence shows beyond a reasonable doubt that he had obtained something of value from another person by means of false representations, knowingly made, with the intent to induce the action taken by the other person.

You may find that the person to whom the false representation was made relied on it, if the evidence shows beyond a reasonable doubt that he would not have turned over something of value but for the false representation made by a defendant.

It is not a defense to the charge that a defendant subsequently reimbursed the complainant or that at the time of the transaction he intended to reimburse the complainant for any loss sustained.

Now, proof of reliance by the alleged victim upon the asserted misrepresentations made to it is an essential element of the crime of false pretense, and the Government in this case must prove beyond a reasonable doubt that the alleged victim of the false pretense relied wholly or partly upon the false pretense in parting with its money as it is alleged to have done in this case. And if you have a reasonable doubt from the evidence whether or not the Eastern Savings and Loan Association in this case acted in reliance [T.722] upon the misrepresentations alleged in this prosecution, you must find the defendants not guilty.

Now, there has been testimony in this case from an official of the Eastern Building and Loan Association or the Eastern Savings and Loan Association that in making the loans they did rely upon the appraised value of the homes. You are instructed that if from the evidence you find that one or more of the defendants conspired to give false information to the bank with respect to the credit status and existence of prospective purchasers, but you further find from the evidence that the bank did not rely upon these representations but made the loans in question in reliance solely upon the actual appraised value of the real estate in question, then the Government would not have proved beyond a reasonable doubt the reliance necessary to find any defendant guilty of the crime of false pretense, and you must find him not guilty. And if you have a reasonable doubt about this, you should give the benefit of that doubt to any defendant as to whom you so find and find him not guilty.

* * * * *

[T.725] You are instructed further as a matter of law that personal attendance by parties to a real estate transaction at the settlement of the property is not a requirement. And I indicated to you in the course of this trial that a straw transaction in and of itself is not an illegal act, and that if you find from the evidence in this case that a defendant or any combination of one or more of the defend-

ants participated [T. 726] in the straw transaction of which Eastern Savings and Loan or Eastern Building and Loan through its officers had knowledge, then you must find as to those defendants not guilty on the offenses charged.

* * * * *

Now, I have prepared for your consideration—and would you pass, give each juror including the alternates one of those.

(Document handed to each juror.)

I indicated to you ladies and gentlemen that when you retire to deliberate, a copy of the indictment will be sent to you. It's 21 pages and it contains 13 counts. There are six defendants named in it and the offenses that we have been talking about are involved.

In order to facilitate and to clarify your responsibility with respect to each count of the indictment and with [T. 727] respect to each defendant, you will return to the Court over the signature of your foreman or forewoman a written reply as indicated in this three-page document.

Now, the first page has reference to the first count of the indictment charging the conspiracy to violate title 22 section 1401, forgery, and section 1301, false pretenses. You are required to consider, the evidence with respect to each defendant as to the conspiracy. You will note that each defendant is listed and your unanimous verdict with respect to each defendant will be recorded by your foreman and then he will sign. In other words, he will check the appropriate column with respect to each defendant on the conspiracy count of the indictment, count one. When you look at the indictment you will see that it takes up the first nine pages of the indictment.

Now, if you will turn to the second page, you will see that it is headed counts two through thirteen. Counts two through thirteen are what you heard the Court refer to as the substantive counts of the indictment. They relate by counts to the 12 straw transactions involving the

fictitious names allegedly obtained from the Harvard Alumni Directory. Each count pertains to a different piece of property. Each count is identical with respect to the defendants named in it and differs only—I repeat—in that each count refers to a [T. 728] different piece of property.

Count two, you will note, refers to—you can't tell it from this paper but you will note when you read the indictment—refers to the Chesley matter about which you have had evidence.

Count three refers to Boesel; count four, Schwartz; count five, Hays, et cetera, through count thirteen.

You are required to find the essential elements of the offense of false pretense, because it is the crime of false pretense to which each of these substantive counts relates. I have set forth for your guidance the five essential elements of that crime of false pretense. So that you will in answering the special findings indicate whether from the evidence the Government has or has not proved the essential elements of the crime that is charged in each one of these 12 counts. Again, each of the elements must be proved beyond a reasonable doubt before you can find a defendant guilty of that offense.

Now, the substantive counts are also set up in that a named defendant is charged to have been aided and abetted by four others. But in considering the substantive counts, which are identical except as to property, you must first consider whether the essential elements with respect to the named defendant has been proved beyond a reasonable doubt and so [T. 729] indicate that you have considered the elements by your foreman signing the result, and if your unanimous answer is yes as to all five essential elements, then the jury foreman will indicate with respect to the bottom where it indicates "verdict" that the verdict is guilty. If with respect to any one or more of the elements your unanimous answer is that the Government has not proved beyond a reasonable doubt that element, then your jury foreman must indicate not guilty.

* * * * *

APPELLANT'S BRIEF AND APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,198

UNITED STATES OF AMERICA, *Appellee*,

v.

WALTER R. REYNOLDS, *Appellant*.

Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 27 1971

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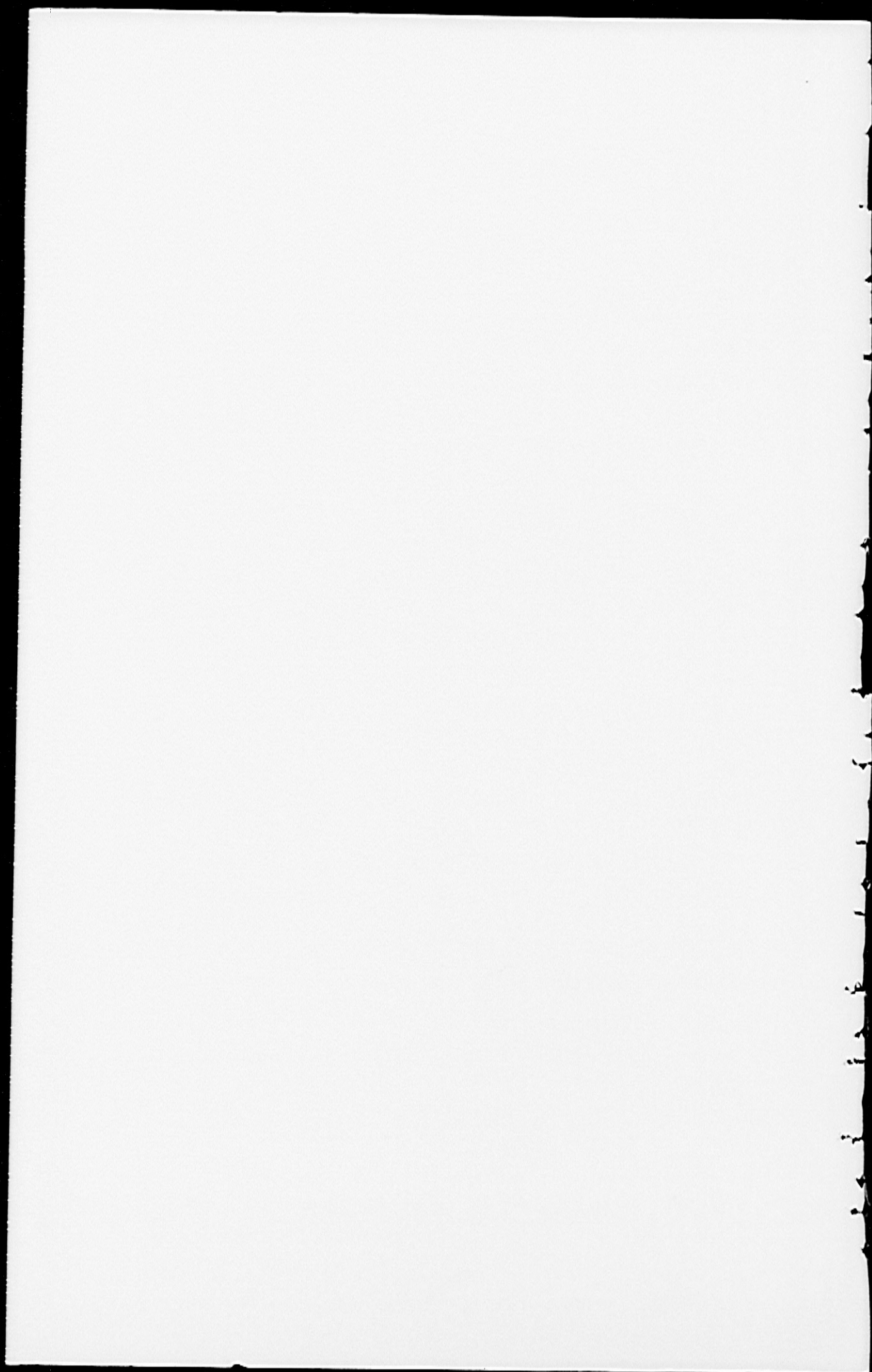


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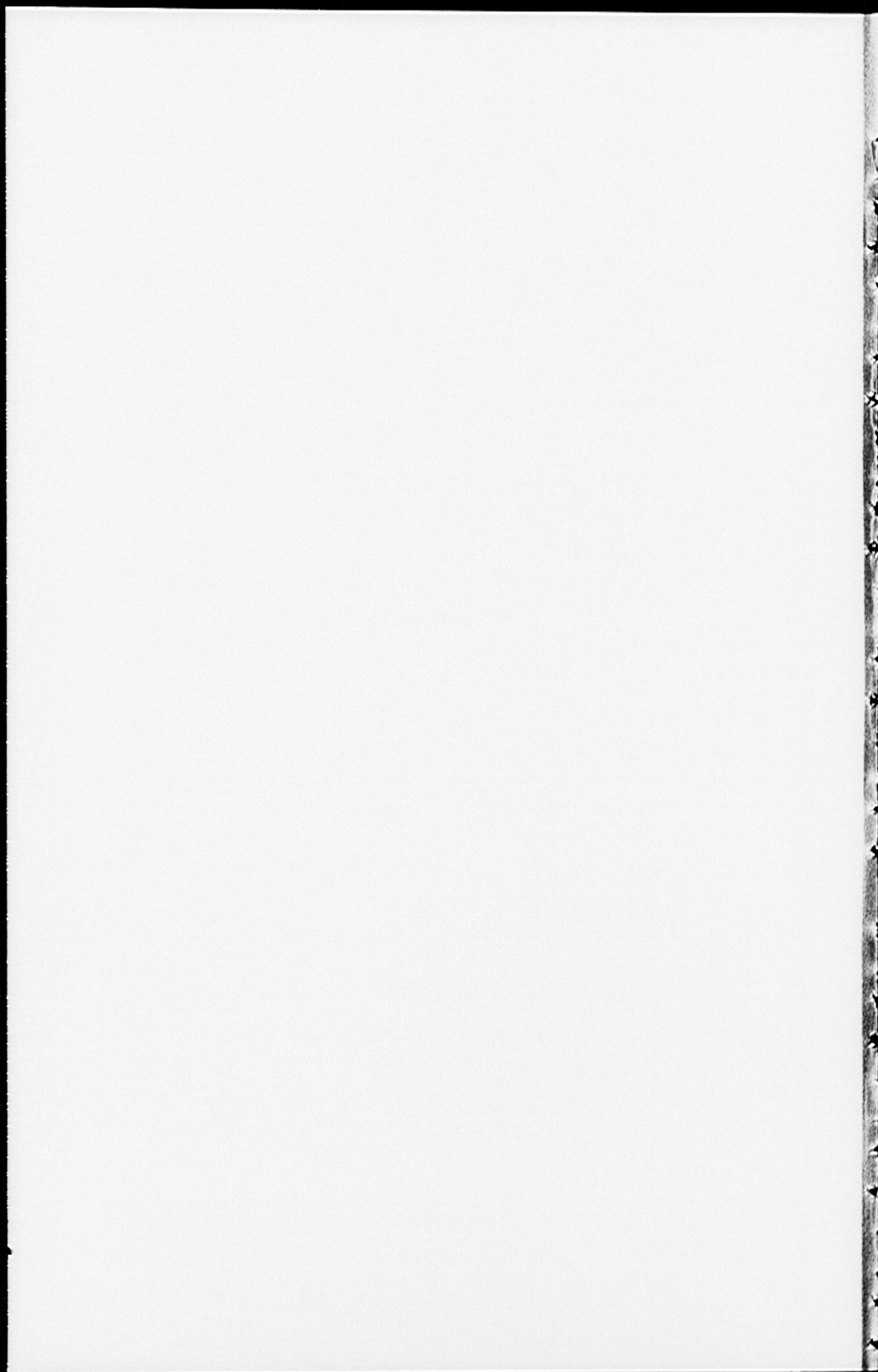
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,198

UNITED STATES OF AMERICA, *Appellee*,

v.

WALTER R. REYNOLDS, *Appellant*.

Appeal from the United States District Court for the
District of Columbia

APPELLANT'S BRIEF

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in overruling a defense motion to dismiss the indictment when not a single grand juror had read, or listened to a reading of, the proposed indictment in its entirety.

2. Whether records secured by an IRS agent pursuant to a search permitted upon his representation that he was to conduct a tax audit are inadmissible under the Fourth Amendment when the agent failed to disclose that in fact he was engaged in a criminal investigation from the outset.

3. Whether the government can prove the essential element of reliance through evidence of the putative victim's general banking practice rather than through evidence of its actual reliance on the loan applications and supporting documents in the mortgage loan transactions alleged in the indictment.

4. Whether the trial court erred in refusing to permit cross-examination of bank officers on the specific loan transactions charged in the indictment following the government's direct examination of such officers on their general practice in loan transactions.

STATEMENT REQUIRED BY THIS COURT'S RULE 8(d)

This case was previously before this Court upon Reynolds' pre-trial petition, joined by Rogers, Dienelt, and Freeman, for a writ of mandamus or prohibition to restrain the trial on the ground that the bill of indictment had not been validly returned by the grand jury. By order dated May 5, 1969, this Court (Wright and McGowan, JJ., in Chambers) denied the petition without opinion. (J.A. 78)

REFERENCE TO RULINGS

The rulings presented for review are contained in three written opinions of the District Court on motions filed below. For the convenience of this Court these opinions are bound with this brief as an appendix hereto. They are the District Court's Pre-Trial Memorandum and Order of September 5, 1968 (App. 1-22); Pre-Trial Memorandum

and Order of May 2, 1968 (App. 22-27), 300 F. Supp. 503 (D.D.C. 1969); Post-Trial Memorandum and Order of December 24, 1969 (App. 28-36). Also presented for review are the trial court's oral rulings of May 5 (J.A. 76-77), May 7 (J.A. 87), May 12 (J.A. 100), and May 13, 1969 (J.A. 112).

STATEMENT OF THE CASE

On September 22, 1967, appellant Walter R. Reynolds, together with Bertram G. Dienelt, Jr., Harlan E. Freeman, R. Marbury Stamp, A. Claiborne Leigh, and E. Neil Rogers, was indicted on thirteen counts set forth in a twenty-one page bill. (J.A. 6-25) Count One charged that, in violation of 18 U.S.C. § 371, the defendants conspired to violate D.C. Code § 22-1301 (false pretenses) and § 22-1401 (forgery) in connection with the refinancing of loans on seventeen parcels of real estate. (J.A. 6-14) Counts Two through Thirteen charged all defendants, except Dienelt, with substantive violations of D.C. Code § 22-1301, each count reciting the refinancing of a loan on one of the first twelve parcels described in Count One. (J.A. 14-25) On May 20, 1969, a jury acquitted Dienelt but convicted the other defendants, including Reynolds, on each of the thirteen counts. (J.A. 4) On January 27, 1970, the trial judge (Robinson, J.) sentenced Reynolds to a term of twenty months to five years on Count One, ordering him to spend six months in jail and suspending the balance of the sentence. On Counts Two through Thirteen the trial judge suspended imposition of sentence. After he serves his sentence, Reynolds is to be placed on probation for two years. (J.A. 5)

On February 4, 1970, Reynolds filed his notice of appeal. (J.A. 5) Defendants Freeman, Rogers, and Stamp have also appealed. By order of this Court the four appeals have been consolidated.

STATEMENT OF FACTS

A. The Investigation.¹

Prior to 1963, the Organized Crime and Racketeering Section of the Criminal Division, Department of Justice, and the Internal Revenue Service formed a special project, known as "The Metro Project", to investigate corruption among public officials of Fairfax County, Virginia. (App.* 1) The project received legal guidance from the Department of Justice but was directed by Oral Cole, a special IRS agent. (App. 1) The project's staff consisted of IRS revenue and special agents, including revenue agents Hansel and Evangelist and special agent McElroy. (App. 1, 2)

A principal target of the Metro Project was defendant A. Claiborne Leigh, who had served as Chairman of the Fairfax County Board of Supervisors. (App. 1) It was suspected by IRS officials that he had taken bribes. (App. 1) In June of 1963, revenue agent Hansel commenced an examination of Leigh's income tax returns for the early 1960's. (App. 1-2) Hansel obtained Leigh's permission to inspect records maintained at his law office. (App. 1-2, T.S.H.** 213, 220) In January of 1964, special agent McElroy accompanied Hansel to Leigh's office; for the first time Leigh was informed, by McElroy, that he was under criminal investigation. (App. 2, T.S.H. 195) McElroy told him he was being investigated for criminal income tax evasion, and advised him of his constitutional rights. The agents did not mention a possible bribery

¹ The background facts herein set forth are drawn from the findings of the trial court in its Memorandum of Opinion denying defendants' motion to suppress evidence (App. 1-22)* and are supplemented by uncontradicted facts contained in the transcript of the two-day hearing on defendants' motions to suppress evidence and quash the indictment on speedy trial grounds. (T.S.H., generally)**

* The reference, App., refers to the appendix bound with this brief.

** The reference, T.S.H., refers to the transcript of the June 4-5 suppression hearing; the pages cited following "T.S.H." are not included in the Joint Appendix, thereby requiring a reference to the original transcript.

prosecution. (T.S.H. 195-96) In early March of 1964 Hansel and McElroy microfilmed Leigh's settlement files on property transactions involving his client the Reynolds Construction Company [hereinafter RCC].² (T.S.H. 175) The agents thereby learned that RCC had made use of straws in real estate transactions. (T.S.H. 176-77) According to the trial court, "[t]hese settlement files were scrutinized in detail by the 'Metro Project' investigators." (App. 2)

As the trial court found, "to ascertain the details of financial transactions between Leigh and Reynolds pertaining to certain properties and sales contracts," (App. 2-3) revenue agent Evangelist was instructed by Director Cole to audit the corporate returns of RCC and the personal returns of Reynolds and his wife. (App. 3, J.A. 38) Special agent McElroy told Evangelist that Reynolds had business dealings with Leigh (J.A. 41): according to Evangelist, "there was an indication that a bribe may have been made." (J.A. 41) Evangelist understood that his assignment was "to look into possible payoffs to Mr. Leigh." (J.A. 47)

Pursuant to his assignment, Evangelist went to RCC's offices in the middle of March 1964. (App. 3) Except for income tax returns, Evangelist had no other records of Reynolds or RCC before commencing his investigation. (J.A. 40) He informed George Steele, an officer of the company, that he was engaged in a tax audit, and obtained permission to inspect all corporate records. (App. 3, J.A. 28, 33-34) Evangelist borrowed and copied settlement sheets and sales contracts.³ (J.A. 43)

² Special agent McElroy testified that Leigh's settlement files consisted of both settlement sheets and sales contracts. (J.A. 51) We can find no indication in the trial testimony that Leigh's copies were admitted at trial. As set forth in the text, *infra*, p. 25, sales contracts and settlement sheets involving the properties set forth in the indictment were obtained from RCC.

³ In November of 1964, Evangelist copied four checks, each for \$200, issued by RCC to four straw purchasers—Saperstein, Rees, Ashby, and Swett. (Trial testimony, T. 148-50)

In October of 1964 special agent McElroy, acting under authority of an IRS administrative summons to produce documents, visited Eastern Savings and Loan Association, which had made loans on real estate transactions involving RCC. (T.S.H. 108-09) He did not testify as to what records, if any, he obtained from the bank. According to the trial court, the Metro Project investigators did not realize until December of 1965 that some of those listed as straw purchasers in fact had no knowledge of such transactions in their names. (App. 17) By late 1965 the investigators had in their possession the documents from Reynolds and RCC that bore on their investigation, and they did not seek additional materials from them.

In January of 1967, after realizing that the defendants could not be prosecuted in Virginia for any violation of Title 18, United States Code, the Department of Justice commenced these criminal proceedings in the District of Columbia. (J.A. 55-56, T.S.H. 148)

B. The Trial.

At trial, the government sought to show that defendants schemed to deceive Eastern Savings and Loan Association [hereinafter the bank] into replacing its outstanding construction loans to RCC with mortgage loans to individual straw parties acting on behalf of RCC. In brief, the bank approved and issued mortgage loans, after having received loan applications and related documents containing false information, and the proceeds from these mortgage loans were used to liquidate the bank's outstanding construction loans to RCC. Although the mortgages were in the names of straw purchasers, most of whom had no personal knowledge of the transactions in their names, RCC undertook to satisfy the monthly payments, and in time assumed the obligations altogether. The primary factual issue, as to which we later argue the government adduced insufficient proof, was whether the bank actually

relied on the false representations in documents submitted to the bank to obtain the mortgage loans.

In 1962 RCC was substantially indebted to the bank for construction loans used to finance the construction of houses in a subdivision development in Virginia. (J.A. 107)⁴ As these loans matured, RCC was unable to procure buyers for the houses. (T.* 167) To refinance the outstanding loans, straw purchasers were used. (T. 214-15) Defendant Dienelt, Reynolds' outside accountant, obtained four straws for RCC from among his employees—Ashby, Berg, Saperstein, and Swett. (T. 214-15, 166-67, 309, & 272) Reynolds instructed defendant Freeman, then secretary of RCC, to obtain additional straws. (J.A. 116) At Freeman's request, Rees agreed to serve as a straw. (T. 249) However, Freeman testified that he could not find other persons willing to act as straws, and picked out names at random from the Harvard University Alumni Directory, selecting twelve names in all, and filled out documents using those names.⁵ (J.A. 116-17)

Rees testified that he furnished credit information to Freeman, to be furnished to the bank, and signed the following documents: a sales contract, between himself as buyer and RCC as seller; a deed of trust, granting trustees authority to foreclose if he defaulted on mortgage payments; and a deed back, transferring title from himself to RCC. (T. 253-62) Rees did not testify about a signature card, issued by the bank, which other straws signed to show their acceptance of loans committed by the bank. The "Dienelt" straws, Ashby, Berg, Saperstein, and Swett, each signed a sales contract, a signature card, a deed of trust, and a deed back to RCC. (*E.g.*, T. 165-77)

⁴ RCC's income tax return for 1962 showed a loss of \$112,508.28. (J.A. 109)

* The reference "T" refers to trial transcript not included in the Joint Appendix.

⁵ Counts Two through Thirteen of the indictment relate to the loan transactions in these twelve names.

While the credit statement of Rees, and possibly of Ashby, reflected their respective assets and liabilities (T. 254-55, 216), credit statements made out in the names of Berg, Saperstein, and Swett showed false assets. (*E.g.*, T. 171-72) In each case, the sales contract showed cash transfers, such as a down payment to RCC, that did not occur. (*E.g.*, T. 171) For each transaction there was a settlement statement, which showed the disbursements of proceeds of the mortgage loan. (*E.g.*, T. 218) Although each sales contract recited that the buyer was to appear at the offices of Leigh & Rogers for settlement, none of the straws attended a settlement in person. (*E.g.*, T. 220) During this period defendants Leigh and Rogers, then in law partnership, acted as settlement attorneys for RCC.

As previously stated, Freeman, after he could no longer find real straws, invented persons to act as straws. For these persons, he made out and signed all the appropriate forms. The government produced six of the twelve persons whose names Freeman had used; they, of course, knew nothing about the transactions.⁶ (*E.g.*, T. 404)

None of the straws personally applied to the bank for a mortgage loan. (*E.g.*, T. 316, 398) This was done by defendant Stamp, a mortgage broker, who filled out a loan application, attached thereto a credit statement, and forwarded both to the bank. (J.A. 128, 85-86, T. 398) For this brokerage service defendant Stamp received a fee of one percent of the loan: on the seventeen transactions herein, he received \$6,075. (J.A. 105, 108) Leigh & Rogers, as settlement attorneys, conducted title searches on the properties; the firm received a total of \$4,754. (J.A. 105) Each real straw received a \$200 fee paid by check from RCC. (*E.g.*, T. 285) Because Freeman fabri-

⁶ As to the other six, the government and defense stipulate that their testimony would be in substance the same as that of the six who testified. (T. 594-98)

cated twelve straw transactions, he received the fees that the twelve straws would otherwise have obtained—\$2,400. (J.A. 105) RCC received \$50,712.44, as the mortgage loans exceeded the construction loans, which were liquidated. (J.A. 105) After deducting the amount of the construction loans (J.A. 85, 107), the bank issued checks to Leigh & Rogers for the balance of the mortgage loans.⁷ The law firm disbursed the proceeds of the mortgage loans on settlement; Stamp, Leigh & Rogers, RCC, and Freeman were paid by check issued by the partnership of Leigh & Rogers. (J.A. 105)

In an attempt to prove reliance by the bank on the false documents submitted to it, the government called two officers of the bank, Robert L. Stoy and Thomas R. Harrison. In 1962-63, the time of the transactions charged, Stoy was assistant treasurer and settlement officer; Harrison was executive vice president. (J.A. 82, T. 541)

Stoy described the mechanics of arranging purchase-money mortgages. (J.A. 82-86) After receiving an application for a loan, an appraiser hired by the bank appraised the property. When the appraiser's report was received, the loan committee "comprised of either two or three of the senior officers [studied] that and [made] recommendations to the executive committee. And then the executive committee [passed] on or [committed] the loans. That [was] comprised of the president of the association and four members of the directors." (J.A. 82-83) At this time a commitment was sent to the applicant or his agent. After a title search was completed, a date was set for settlement. For purposes of settlement the bank prepared a deed of trust, a deed of trust note, a signature card, and a payment book. These documents were forwarded to the attorney who oversaw the settlement.

⁷ Apparently, these checks were introduced without being further identified, as they are listed in the Clerk's record of exhibits. (E.g., Ex. 31; see T. 393-94)

The deed of trust and the signature card were returned to the bank, as was a copy of a completed settlement sheet. The bank then sent the proceeds of the loan, less the amount of any outstanding construction loan, to the settlement attorney.

On cross-examination Stoy testified that he approved the credit of the individuals who applied for loans on the seventeen properties herein involved. (J.A. 89-90) He made no attempt, however, to contact the prospective purchasers because, as of 1962-63, "it was not the practice of the association to investigate any credit." (J.A. 86) It was the practice of the bank to make all loans "on the appraised value of the property . . . [and that alone]." (J.A. 91) At another point in his testimony, however, he stated that an application for a loan would not be considered if it was found to be based on false information. (J.A. 92) Stoy stated that, to the best of his knowledge, the bank followed the same procedure in dealing with all loan applications. (J.A. 89)

Harrison's description of the procedures employed by the bank paralleled Stoy's. (J.A. 95-97) He testified that the bank would not make loans based on false information. (J.A. 96) On cross-examination, when the defense began a line of questioning designed to show that the bank knew that the loan applications were made by straws, the court sustained the government's objections.

The Court: The whole examination, the principal examination of this witness had to do with general practice of Eastern Savings and Loan, and not once did he testify to the 17 transactions. . . . He has not gone into it. I will not permit it. I will stand on my ruling. (J.A. 100)

The Court: You can recall him for the defense's case. I am not forcing the Government to try the defense's case in the prosecution's case. (J.A. 98-99)

At the close of the government's case, the trial court expressed doubt about the adequacy of the proof on re-

liance (J.A. 109-10) but denied defendants' motion for a judgment of acquittal. (J.A. 112) The defense had taken the position, which it has continued to assert at all appropriate stages, that the absence of any proof of the bank's handling of the seventeen specific transactions required the entry of judgment of acquittal. Thus, when Harrison returned as a defense witness, he was called solely as a character witness for Reynolds, and was not asked about the seventeen specific transactions. (J.A. 112-13) Freeman was the only defendant to testify. Freeman stated that Stamp had told him and Reynolds in 1962 of the unwillingness of the bank to extend construction loans until fifteen to twenty houses were out of RCC's name (J.A. 114) and that Stamp told Reynolds that "with the knowledge and the concurrence of Eastern Savings and Loan, we were to straw these houses out." (J.A. 116) Finally, Freeman admitted that he had taken names from the Harvard Alumni Directory, and had filled out sales contracts and other documents in these names. He did not inform any other defendant of what he had done. (J.A. 117)

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE INDICTMENT ON ACCOUNT OF A FUNDAMENTAL DEFECT IN THE MANNER OF ITS RETURN

A pretrial hearing established that the foreman of the grand jury certified the indictment as a True Bill even though he had not read it and, to the best of his recollection, no other grand jurors had read it. As soon as counsel for Reynolds happened upon this defect, Reynolds moved to dismiss the indictment. (J.A. 3) Following a hearing on the merits of the motion, at which the foreman testified, the court rejected the motion as untimely. *United States v. Reynolds*, 300 F. Supp. 503 (D.D.C. 1969) (App. 22-27) In its opinion the court eschewed any comment on the merits of the motion. The court thereafter

denied defendants' motions for reconsideration and in arrest of judgment. (J.A. 4, 5)

A. The Return of the Indictment

At the hearing of April 28, 1969, on the motion to dismiss the indictment, Evan L. Swain, foreman of the grand jury, testified that he had not read the indictment before he signed it. (J.A. 68) He was unable to testify that other grand jurors read it. (J.A. 67) As he recalled the events of September 22, 1967, the final day of the grand jury's deliberations on this case, the prosecutor, Edward Molenof, summarized the evidence (J.A. 66-67) and read from "the first part" of the proposed indictment. (J.A. 67-68)⁸ Molenof did not instruct the grand jury to read the proposed indictment. (J.A. 67) When Molenof went out of the grand jury room, he left the proposed indictment in a closed manila folder. (J.A. 66, 69) The members of the grand jury discussed the matter among themselves and voted to indict. (J.A. 67) The indictment was returned in open court by 10:15 a.m. the same morning. (See letter dated 4/29/69 from counsel for Reynolds to Robinson, J., filed May 1, 1969 & footnote 11 *infra*, p. 14)

Molenof did not testify but represented that he read Counts One and Two and "practically read" the remaining eleven counts to the grand jury. (J.A. 62) Later in the hearing Molenof conceded in response to the court's inquiry that he had not read the indictment in its entirety to the grand jury. (J.A. 69-70) The previous session of the grand jury had occurred nearly three months earlier, on June 23, 1967. (J.A. 64)

⁸ On this point Swain's sworn testimony is in full: "Well, it seems that he [Molenof] read the first part, but I can't remember how far down or how many counts that there were on it. . . ." (J.A. 67)

B. The Motion To Dismiss Was Timely

In holding that the motion to dismiss was untimely, the trial court ruled that, in light of Reynolds' trial counsel's representation "that he was outside the Grand Jury room during those allegedly abbreviated deliberations," 300 F. Supp. 503, at 506 [App. 26], counsel should have suspected, as early as September 22, 1967, that members of the grand jury had not read the indictment. According to the court, counsel had an opportunity to explore this suspicion because, at a prior hearing,⁹ the foreman had testified, and counsel could have pursued at that time the grand jury's failure to familiarize itself with the proposed indictment. "Thus, the facts concerning the newly alleged defects in the Grand Jury proceedings were 'notorious and available to [defendants] in the exercise of due diligence' long before April 28, 1969, one week prior to the scheduled commencement of trial." 300 F. Supp. 503, at 506 [App. 26].

The court's holding, however, proceeds from a faulty factual foundation. Counsel for Reynolds was *not* present outside the grand jury room during its September 22 session. Counsel represented merely that he arrived outside the room at 10:18 a.m. and discovered that the grand jury was no longer there. (4/28/69 T.* 33)¹⁰ At the April 28 hearing, counsel sought to show that the grand jury in fact

⁹ In an earlier motion counsel sought dismissal of the indictment because witnesses appearing before the grand jury had, apparently, been illegally sworn to secrecy. On August 5, 1968, the court held a hearing, at which foreman Swain testified. We do not here contend that the court improperly denied this initial motion.

* The reference 4/28/69 T., followed by a number, refers to the page in the transcript of the hearing on that date which is not included in the Joint Appendix.

¹⁰ Counsel wanted to be present in the courtroom when the grand jury returned the indictment so that he could bring to the court's attention his concern over the swearing to secrecy of grand jury witnesses. The prosecutor had informed him that the grand jury would convene at 10:00 a.m. and that the grand jury would not proceed to the courtroom before 10:30 a.m. When counsel arrived outside the grand jury room at 10:18 a.m., the Marshal told him that the grand jury had already gone home. (J.A. 75)

convened about 10:00 a.m. (J.A. 64) If the grand jury had convened at 10:00 a.m. and returned the indictment in open court at 10:10 a.m.,¹¹ then the grand jury, plainly, had no meaningful opportunity to review the evidence and read the proposed, twenty-one page indictment. However, counsel at no time represented he knew when the grand jury convened, and his client, Reynolds, cannot be charged with knowledge his attorney never possessed. When counsel corrected the court's mistaken understanding of fact, the court stood on its opinion, ruling from the bench that counsel, by lack of diligence, had waived his client's right to challenge the newly discovered infirmity in the return of the indictment. (J.A. 76-77)

Because lawyers naturally would presume official regularity in grand jury deliberations, it is unrealistic, we submit, to suppose that, through some undefined exercise of diligence, counsel should suspect an irregularity before he in fact happens upon it. The important point is that, once counsel for Reynolds discovered the defect, he made an appropriate motion that brought the matter promptly to the court's attention. (J.A. 70-71, 74) Significantly, in its answer the government did not question the timeliness of

¹¹ Counsel could demonstrate the exact time of the return of the indictment in open court from the notes of the court reporter. (See letter, dated 4/29/69, from counsel for Reynolds to Robinson, J., filed May 1, 1969.) At the April 28 hearing, however, the foreman did not recall the precise time the grand jury commenced its September 22 session: "Q.: If I told you that it was ten o'clock in the morning, would that refresh your recollection?" "A. Well, I don't know. It was long about that time but I wouldn't say that was the definite time." (J.A. 64) (At the next hearing, when the court entertained argument on defendants' motion for reconsideration, Bruce Burns, on behalf of the government, represented that the grand jury convened at 9:15 a.m. (J.A. 73)) Until the April 28 hearing, moreover, counsel for Reynolds had no way of knowing whether the grand jury reviewed the bill of indictment on one or more occasions before its session of September 22. (The grand jury had met on this case on April 28, May 5, May 12, June 23, and September 22, 1967.) (J.A. 64) Thus, given Reynolds' counsel's belief that the grand jury convened at 10:00 a.m., as the prosecutor had represented it would, there was still no reason for him to suspect that the grand jury had not previously considered the indictment.

the motion. (Government's Answer to Motion to Dismiss the Indictment, filed 4/23/69) And, at the April 28 hearing, the court did not so much as hint at a timeliness problem. Rule 12(b)(2), Fed.R.Crim.P., which the court invoked against the defendants, requires that, as of the time defendants make their first motion, they include "all such defenses and objections *then available*." (Italics added.) Because the defect complained of at the April 28 hearing had just been discovered one week earlier (J.A. 70-71), it was not "then available" at the hearing of the initial motion, and, for the same reason, it could not have been asserted by motion before plea. See Rule 12(b)(3), Fed. R.Crim.P. As the defect was raised by pretrial motion upon its discovery, the court erred in denying the motion as untimely. Compare *United States v. Wilson*, No. 22,721 (D.C. Cir., June 11, 1970).

While the indictment herein was returned before the date of this Court's non-retroactive decision in *Gaither v. United States*, 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969), the defect in this case is both different from, and more basic than, that condemned in *Gaither*. As we show in the next section, the defect herein—that no one on the grand jury ever read the charging document—is fundamental, and a trial court must take note of it because its presence, when noted, dislodges a court's jurisdiction. Thus, if the motion to dismiss heard on April 28 should have been filed sooner, Rule 12(b)(2), Fed.R.Crim.P., permitting the assertion of jurisdictional defenses at any time, precludes a court from rejecting such a motion on a timeliness ground.

C. The Trial Court Should Have Granted the Motion To Dismiss

In *Gaither* this Court held invalid the indictment procedure that had long been used by the United States Attorney's Office in this jurisdiction. In the instant case the grand jury proceedings were conducted not by the United States Attorney's Office but by the Criminal Division of

the Department of Justice. The procedure challenged herein, perhaps unique, differs in significant respects from that utilized in pre-*Gaither* prosecutions by the United States Attorney's Office.

Under the procedure condemned in *Gaither*, the grand jury heard evidence and next voted to indict (or not to indict), recording an affirmative vote in the form of a "presentment" which set forth the accused's name and the name or statutory designation of the offense voted upon. The Assistant United States Attorney in charge of the grand jury proceeding next drew up the indictment, charging the offense designated in the presentment and framing specific allegations in accordance with the grand jury's intentions, as he understood them. The indictment so drawn was then read by the foreman and signed by him without its contents having been approved by the grand jury as a whole. In *Gaither*, this Court upon rehearing stated that, as to indictments returned prior to the date of the *Gaither* decision (April 8, 1969), there would be an irrebuttable presumption that the foreman would not have signed the indictment unless he had faithfully reviewed it with his best recollection of the grand jury's deliberations in mind, and that he would not have signed the indictment unless convinced, in light of such review and his reading of the indictment, that the grand jury as a whole would have voted to return the indictment as drafted. *Gaither* at 164, 165 & 177, 413 F.2d 1061, at 1071, 1072, & 1084.

In this prosecution, by contrast, the proposed indictment was prepared before, not after, the grand jury's decision to indict. But, when the foreman signed, neither he nor, as far as he could recall, any other member of the grand jury had been asked to examine or had in fact examined the proposed indictment, enclosed in a manila folder. Unlike the pre-*Gaither* practice of the United States Attorney's Office, the procedure herein permitted the return of an indictment without faithful review of its terms by the fore-

man or any other grand jury member. Since the indictment was drawn before rather than after the grand jury reached any decision, it could not be said to reflect the intent expressed by a prior vote of the grand jury. In this case, when the prosecutor drafted the indictment, he did not know whether the grand jury believed Reynolds should be charged, much less the specific offense or specific allegations on which the grand jury might insist. And, since the foreman never read the indictment, there could be no irrebuttable presumption that he found that its terms reflected the grand jury's intent.

In *Gaither*, this Court carefully reviewed the function served by a grand jury. The discussion stressed that "[t]he content of the charge, as well as the decision to charge at all, is entirely up to the grand jury—subject to its popular veto, as it were." *Gaither* at 159, 413 F.2d at 1066. It noted "[t]he sweeping powers of the grand jury over the terms of the indictment," including its "unreviewable power to refuse indictment, and to alter a proposed indictment. . . ." *Ibid.* Because the holding in *Gaither* was based upon the violation of Rule 6, Fed.R. Crim.P., this Court did not reach the question of whether there had been a denial of *Gaither's* Fifth Amendment right not to be tried for an infamous crime except by an indictment of a grand jury. But Rule 6 was construed in the light of the Fifth Amendment requirement:

We conclude then that Rule 6 requires the grand jury as a body to pass *on the actual terms of an indictment*. We are impelled to this conclusion largely by the constitutional principles of *Bain* [*ex parte Bain*, 121 U.S. 1 (1887)], *Stirone* [*v. United States*, 361 U.S. 212 (1960)], and *Russell* [*v. United States*, 369 U.S. 749 (1962)], which emphasize the right of the accused to be tried on an indictment which has in each material particular been approved by a grand jury. (Italics added.) *Gaither* at 164, 413 F.2d at 1071.

Reynolds contends that his rights under both the Fifth Amendment and Rule 6 were violated by the grand jury's

failure "to pass on the actual terms of" the indictment against him. Traditionally, as noted in *Gaither*, the grand jury finds (or does not find) a bill of indictment. See *Gaither* at 162 & n. 21, 413 F.2d at 1069 & n. 21. A critical part of the grand jury's role, therefore, is to review the content of a proposed indictment. Unless this is performed, the grand jury simply is not in a position to approve or ratify the prosecutor's handiwork. A grand jury that purports to approve or ratify what it has not seen completely fails in its duty to act as a check on prosecutorial discretion. Such a grand jury, we submit, forfeits its power to find the charges contained in a bill of indictment.

By way of illustration, the indictment purportedly returned in this case provides a fair example of what can happen when the grand jury fails to exercise its power of review. The indictment herein is, by any standard, a clumsy document. For example, Counts Two through Thirteen each charge that Reynolds, not the bank, acted in reliance on the false representations.¹² Count One is unnecessarily involved, as well as poorly drafted. It is, we respectfully suggest, not easy to comprehend. Thus, even a grand jury prepared to indict, if it read and studied this bill of indictment, might have required the prosecutor to resubmit it. Or, a grand jury genuinely engaged in exercising its independent judgment might, of course, have insisted upon substantive modifications in the bill of indictment.

¹² Stripped of excess verbiage, each of these counts alleges that "... the defendant, Walter R. Reynolds, ... obtained ... monies ... from the Eastern Savings and Loan Association ... in reliance on [false] representations" The subject of the sentence is "the defendant, Walter R. Reynolds." (J.A. 14-25) The verb is "obtained." "Monies" is the direct object of the verb "obtained," and "in reliance on [false] representations" is a subordinate adverbial clause modifying the verb "obtained," which refers to Walter R. Reynolds. "Eastern Savings and Loan" is not the subject of the sentence. Thus, the sentence alleges that Walter R. Reynolds relied on false representations in obtaining the money, not that Eastern Savings and Loan Association relied on false representations in granting the loan.

The issue we raise here is no mere technicality. It goes to the essence of the grand jury system. The procedure adopted by this grand jury pointedly deprived Reynolds of his Fifth Amendment right to an "indictment of a Grand Jury."

Because the grand jury did not find the indictment upon which defendant Reynolds was tried, the defect is, as previously asserted, jurisdictional under Rule 12(b)(2), Fed. R.Crim.P. This jurisdictional consequence is implicit in cases setting aside criminal judgments on jurisdictional grounds because of amendments to an indictment subsequent to its return. In the leading case, *Ex parte Bain*, 121 U.S. 1 (1887), the grand jury had at least voted upon the indictment, as well as an additional phrase thereafter improperly deleted by amendment. The Supreme Court, granting habeas corpus, held that a trial court lacked jurisdiction to try a defendant on a charge differing from that found by a grand jury. In *United States v. Norris*, 281 U.S. 619, 622-23 (1930), cited with approval in *United States v. Sisson*, 399 U.S. 267, 281 (1970), the Supreme Court noted, in reliance upon *Bain*, that an amendment to the indictment "would oust the jurisdiction of the court." See also *Carney v. United States*, 163 F.2d 784 (9th Cir.), cert. denied 332 U.S. 824 (1947). In the instant case, unlike *Bain*, the charges were not even initially found by a grand jury. It follows that, if the defect in *Bain* was jurisdictional, the defect herein was necessarily jurisdictional.

Even if the defect be deemed not jurisdictional, a showing of prejudice is not required. For with the kind of presumption involved in *Gaither* not available here because the foreman did not read the indictment, there is no room for an assumption that, if the grand jury had read the prosecutor's complicated bill of indictment, framed before the grand jury's intent to indict became known, the grand jury would have found each and every fact set forth therein. See *Russell v. United States*, 369 U.S. 749, 770 (1962).

Lastly, the procedure herein, if invalidated by this Court, will not cause a significant disruption in the administration of justice in the District of Columbia. In comparison to the United States Attorney's Office, other Department of Justice attorneys handle relatively few grand jury proceedings in this jurisdiction. There is no indication, furthermore, that the foremen of grand juries supervised by the Department of Justice have made a routine practice of not reading bills of indictment which they sign. In any event, like appellants Gaither and Tatum in *Gaither*, Reynolds would be entitled under Article III of the Constitution to the benefit of a favorable ruling on his challenge to the grand jury practice herein. See *Gaither* at 178, 413 F.2d at 1085 (*per curiam* decision on rehearing).

II. THE TRIAL COURT ERRED IN NOT GRANTING REYNOLDS' MOTION TO SUPPRESS EVIDENCE SEIZED IN VIOLATION OF THE FOURTH AMENDMENTS.

The transcript of the suppression hearing establishes beyond the possibility of reasonable challenge three propositions: (1) The purpose of the Metro Project was to seek out evidence of crime. (2) In furtherance of this purpose IRS agents, working under a special agent, obtained records which resulted in the charges preferred in this case. (3) When agents obtained permission to search through records pertaining to RCC's business affairs, they did not inform RCC of their true purpose.¹³

¹³ In denying defendants' motion to suppress, the trial court concentrated largely on the failure of the agents to give *Miranda* warnings when they asked defendants to submit to general searches of their files. We make no *Miranda* contention; at trial, the government did not introduce any statement obtained in violation of *Miranda*. In the latter part of its opinion (App. 17-22) the court discusses the Fourth Amendment contention we here make. There is no support in the transcript of the suppression hearing for the "finding," which emerges in the court's discussion of the law, that "the original purpose of the Government was to conduct a civil tax audit." (App. 20) A disinterested reading of the testimony of the IRS agents compels the conclusion that the very purpose of the Metro Project was to uncover evidence of criminality.

In these circumstances a timely motion to suppress should be granted. When, as here, criminal prosecution is contemplated from the outset,¹⁴ the government cannot properly solicit consent to a general search without disclosing its real objective. Recently, the Solicitor General has even acknowledged to the Supreme Court that the government has a constitutional obligation to inform a person initially being investigated for civil liability that he may be subjected to criminal prosecution when the investigation reveals evidence of crime. We quote at length from the Solicitor General's Brief for the United States in *United States v. Kordel*, 397 U.S. 1 (1970), because the brief serves to underscore the constitutional inadequacies of the conduct of the Metro Project investigators in purporting to obtain the valid consent of RCC to a general search of its files.

This is not to say that the existence of parallel criminal and civil remedies imposes no obligations on the government to proceed with care so as not to [violate] the rights of a prospective criminal defendant. *The government cannot, of course, use one kind of proceeding solely for the purpose of obtaining evidence for use in another type of proceeding.* This Court and others have indicated that such bad faith use of criminal or civil procedures is impermissible. See *United States v. Proctor and Gamble Co.*, 356 U.S. 677, 683-684; *United States v. Pennsalt Chemicals Corp.*, 260 F. Supp. 171 (E.D. Pa.); cf. *Beard v. N.Y. Central R. Co.*, 20 F.R.D. 607 (N.D. Ohio); see, also, *Abel v. United States*, 362 U.S. 217, 225-230. Even without a showing of bad faith, the courts have found unfairness where a government agency, after initiating an administrative or civil action against the defendant, did not inform him of the fact that criminal

¹⁴ In speaking of the goals of the Metro Project, Edward Joyce, an attorney with the Organized Crime and Racketeering Section, Department of Justice, who served as advisor (J.A. 53) and gave direction (T.S.H. 137) to the Metro Project, testified: "Well, the investigation was an income tax investigation into various activities in Fairfax County, that is, to ascertain whether people were accepting bribes were paying income taxes on the bribes accepted and whether the people who were paying the bribes were properly charging them or not charging, rather, as an expense, and [whether] the gambling was conducted under the Wager Tax Stamp Act." (J.A. 53)

prosecution against him for the same conduct was seriously contemplated or had been recommended. Such failure to apprise the defendant of the contemplated criminal proceeding has been held to preclude the government's use therein of any evidence obtained in the civil proceeding. See *United States v. Parrott*, 248 F. Supp. 196 (D.D.C.), and cases cited therein; cf. *Gouled v. United States*, 255 U.S. 298. But when there has been no deception or unjustified failure to apprise a defendant that criminal prosecution might ensue (as where there had been no preliminary consideration of criminal prosecution), the government is permitted to use evidence disclosed by the civil investigation in the criminal case. See *United States v. Parrott*, No. 66, Cr. 243 (S.D.N.Y.), decided February 14, 1969; see, also, *United States v. Sclafani*, 265 F.2d 408, 414-415 (C.A. 2), certiorari denied, 360 U.S. 918; *United States v. Light*, 394 F.2d 908, 913-914 (C.A. 2); *United States v. Squeri*, 398 F.2d 785 (C.A. 2). (Italics added.) Brief for the United States, pp. 31-32.

In the typical tax fraud case, in which the taxpayer has later challenged the validity of his consent to a search, an IRS revenue agent has been conducting a routine audit and in the course of that audit he has discovered evidence of criminal tax fraud. At this point a special agent enters the case and continues the investigation. The taxpayer is not apprised of the altered purpose of the investigation.¹⁵

¹⁵ IRS special agents are criminal investigators; their jurisdiction is limited to cases involving criminal tax conduct. For the typical case that assumes criminal aspects normal IRS procedure is well stated in *United States v. Turzynski*, 268 F. Supp. 847, 849 (N.D. Ill. 1967):

"The United States Internal Revenue Service conducts both civil investigations to determine whether deficiencies should be assessed against taxpayers and criminal investigations to develop evidence for potential criminal prosecution. In practice, civil investigations are conducted by a different division at the IRS than that which conducts criminal investigations. Civil investigations are conducted by Internal Revenue Agents. As soon as an Internal Revenue Agent has reason to believe that the taxpayer under investigation has committed a criminal violation, he must refer the case for criminal investigation. If his superiors in the civil department agree with his conclusions, the case is referred to the Intelligence Division of the Internal Revenue Service whose jurisdiction is limited to criminal investigations. The investigators of the Intelligence Division are known as Special Agents."

In the instant case, because of the way the Metro Project was organized, the revenue agents did not function in their customary pattern. Instead, they

In these cases the courts have considered whether the initial consent was obtained by fraud, deceit, or trickery, and whether the scope of the consent was limited to a search in furtherance of a routine audit. In the typical case, it is fair to state, federal appellate courts have sustained the government. *E.g.*, *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970), *United States v. Sclafani*, 265 F.2d 408, 414 (2d Cir.), *cert. denied* 360 U.S. 918 (1959). Compare *United States v. Turzynski*, 268 F. Supp. 847 (N.D. Ill. 1967) (sustaining taxpayer), approved in *United States v. Dickerson*, 413 F.2d 1111, 1115 (7th Cir. 1969); *United States v. Guerrina*, 112 F. Supp. 126 (E.D. Pa. 1953), modified in part 126 F. Supp. 609 (E.D. Pa. 1955) (sustaining the taxpayer in part), cited with apparent approval by the Supreme Court in *United States v. Kordel*, *supra*, at 12, n. 24. Those cases did not present the situation where, as here, the investigation from the beginning was solely motivated by a strong suspicion of criminal conduct, and in that context the taxpayer's consent to a general search was obtained. In *Kordel*, where the conduct of the government was sustained, the Supreme Court, while not ruling upon the issue herein presented, recognized its continuing recurrence:

We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution²³ or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution²⁴ *Kordel* at 11-12.

²³ Cf. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683-684; *United States v. Pennsalt Chemicals Corp.*, 260 F. Supp. 171; and see *United States v. Thayer*, 214 F. Supp. 929; *Beard v. New York Cent. R. Co.*, 20 F.R.D. 607.

²⁴ See *Smith v. Katzenbach*, 122 U.S.App.D.C. 113, 114-116, 351 F.2d 810, 811-813; *United States v. Lipshitz*, 132 F. Supp. 519, 523; *United States v. Guerrina*, 112 F. Supp. 126, 128.

were assigned to the Metro Project and, as noted, reported to Director Cole, a special agent; they worked out of offices assigned to the Metro Project, not their regular offices. (J.A. 43, 33)

By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must advise him of his constitutional rights. 1968 CCH Fed. Tax Rptr. ¶ 6946.

In contrast to the typical tax fraud case, the rule to be applied when criminal tax conduct is suspected from the outset is set forth in *Goodman v. United States*, 285 F. Supp. 245 (C.D. Cal. 1968). In *Goodman*, as here, IRS agents were searching for evidence of crime when they first approached the taxpayer. Initially, the purpose of their investigation was to determine the tax liabilities of a corporation (before the taxpayer had acquired its stock) and of the corporation's previous sole shareholder. During their investigation the agents discovered evidence which led them to believe that the taxpayer and his corporations might have committed criminal tax fraud. Although the special agents had initially obtained his consent to a search of his files, as well as those of his corporations, they failed to inform him when their investigation began to focus on him. The court ordered the suppression and return of all documents taken after the criminal investigation of the taxpayer commenced, and enjoined the use of the documentary material and leads obtained from it in any proceeding against the taxpayer or his corporations.

In the instant case, a revenue agent, operating under the express direction of a special agent, obtained permission to conduct a general search on the strength of his representation that he was conducting an audit of a routine nature. In fact, he was not interested in a routine audit. The uncontradicted evidence shows that Reynolds was suspected of bribing Leigh (J.A. 41, 47, 53);¹⁶ to obtain evidence of a bribe, which would criminally implicate both Leigh and Reynolds, agent Evangelist used the pretext of being engaged in an audit. (J.A. 28) Thus, this case, unlike *Goodman*, involved from the outset suspected criminal conduct by the taxpayer; *a fortiori* the rule of the *Goodman* case applies. The principle we ask this Court to apply received able expression, long ago, in *Gould v. United*

¹⁶ Leigh, as a member of the Board of Supervisors during the years in question (App. 1), would have voted upon any applications that might have been submitted by RCC.

States, 255 U.S. 298, 305-06 (1921), which condemns the use of clandestine means to obtain papers from home or office, and that principle has been followed by this Court. *E.g.*, *Nelson v. United States*, 93 U.S. App. D.C. 14, 208 F.2d 505, *cert. denied* 346 U.S. 827 (1953); *cf. Smith v. Katzenbach*, 122 U.S. App. D.C. 113, 351 F.2d 810 (1965).

It is not possible to ascertain from the transcript of the suppression hearing or of the trial the source of the documents introduced at trial.¹⁷ While many of the exhibits themselves bear notations setting forth their source, including some which are identified as from RCC's files (*e.g.*, Exhibit 20-A, a \$200 check signed by Reynolds and payable to Ashby for straw services), other exhibits bear no indication of their origin on their face. In this group some are almost certainly from RCC, as they bear the handwriting of RCC personnel. It is also not possible to ascertain which documents were obtained as a result of leads from tainted sources. Because the trial court denied Reynolds' motion to suppress on the basis of no illegality, the government was not required to proceed solely on the strength of documentary materials from proven independent sources. As the government has not shown that its documentary evidence was obtained from untainted sources, if the search is held unlawful, the judgment must be reversed or alternatively vacated for a remand hearing on the issue of taint.

¹⁷ In view of the pretrial ruling sustaining the search, no effort was made at trial to track down the origin of documents sought to be admitted into evidence. (Defendants did not question the documents' authenticity.) At the suppression hearing the government defended the conduct of the searches; it did not argue that the evidence so obtained was not part of its case. The suppression hearing proceeded on the assumption that the government's case would be substantially affected by an adverse ruling on the search issue.

III. THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH RELIANCE BY THE BANK

A. The Trial Court Erroneously Held That the Jury Could Infer Actual Reliance from the Bank's General Commercial Practice.

The trial court correctly instructed the jury that to justify a conviction it had to be persuaded of the bank's reliance on the false loan documents submitted to it. (J.A. 128-29) In the trial court's Post-Trial Memorandum Order wherein it considered but rejected the argument we here make, it adhered to the view that reliance was an essential element. (App. 31-36) Whether the bank in fact relied upon the false documents was thus a factual issue of foremost primacy.

During the trial, however, the government declined to explore the actual knowledge of its own witnesses from the bank concerning the loans charged in the indictment, though whatever knowledge they had bore directly on the issue of the bank's reliance, and this failure deeply troubled the trial court. After the government rested, the court inquired of government counsel why the bank officers who approved the loans had not been produced, and the following colloquy ensued:

The Court: Where are they? Where are the people that dealt with these transactions? If they are dead, the Government ought to say so. If they are in Viet Nam, the Government ought to say so. Are you in a position to advise the Court why they were not here?

Mr. Burns:¹⁸ Right now, I am not sure that Stoy was not one of those persons. Mr. Harrison, I believe, was. The question wasn't asked of him with respect to these transactions.

¹⁸ In fairness to Mr. Burns, it should be noted that he did not conduct the examination of the bank officers.

The Court: If Mr. Harrison was the person involved in 1962, pray tell why you didn't ask him about these specific transactions?

Mr. Burns: I cannot answer the question. I can't answer why the question was not asked. (J.A. 110)

At trial the government did not so much as attempt to show that the bank in fact relied on the false loan documents. "The theory of the Government's case was that [the bank] followed a general practice of relying on representations made in loan applications, and that from this general practice of reliance, a jury might infer that [the bank] relied on the seventeen applications which the defendants submitted." (Post-Trial Mem. & Order, App. 32) The trial court fairly summarized the government's strategy:

The Government was particular to restrict its direct examination of bank officials to the general practices which the bank followed after loan applications were received. The Government offered no evidence about the specific treatment of the seventeen applications in question. When the defendants attempted on cross-examination to enter this area, the Government successfully objected on the ground that the direct examination had been limited to [the bank's] general practices. [J.A. 87] Throughout the proceedings, the Government adhered to the position that, on the strength of evidence about the general practice of [the bank] to require, accept and process loan applications, a jury would be fully justified in inferring that the applications which the defendants submitted were in fact relied on by [the bank] as the basis for making the loans. (Italics added) (Post-Trial Mem. & Order, App. 32)

In denying Reynolds' post-trial motion for a judgment of acquittal, the court reasoned that "[t]he Government's testimony afforded a basis for a conclusion that [the bank] followed a general practice of reliance on the contents of loan applications. From this conclusion, a jury could have inferred that [the bank] relied on the seventeen applica-

tions which the defendants submitted." (Post-Trial Mem. & Order, App. 35)¹⁹ It is our contention that the government has not satisfied its burden of proving the essential element of reliance when the most it is willing to show is a general practice of reliance in the normal transaction.

In misrepresentation cases, when the showing of reliance has been questioned on appeal, this Court has carefully reviewed the record to satisfy itself that "the alleged fraud would not have been accomplished but for the misrepresentations made." *Gilmore v. United States*, 106 U.S. App. D.C. 344, 347, 273 F.2d 79, 82 (1959), quoted with approval in *Ciullo v. United States*, 117 U.S. App. D.C. 31, 33, 325 F.2d 227, 229 (1963). In *Gilmore*, the hotels would not have cashed the checks if they had known they were not good. It did not matter that the hotels could seek redress against the issuers of credit cards on whose faith the hotels had cashed the checks. In *Ciullo*, the salesman would not have allowed the television set to leave his control if he had known the check tendered in payment was not good. In these cases, and countless like them, the victims have testified that they would not have consummated the transaction if they had known of the misrepresentation.

When the transaction is a routine one, and the victim happens not to recall it, he must be asked about his general practice. His testimony that he does not remember any deviation from his general practice then provides circumstantial evidence that he followed his general practice in the transaction at issue. Negative testimony of this kind is constantly received. According to Wigmore, "[t]he only

¹⁹ The court continues: "The probative value of the testimony about [the bank's] general practice was not vitiated by the Government's failure to prove the processing of the specific applications in question, particularly in light of Harrison's testimony that the applications would not have been accepted and loans would not have been made had [the bank] known the applications were forged, and that verification of the contracts tended not to be made when applications were received from agents such as Stamp with whom [the bank] had had prior dealings." (Post-Trial Mem. & Order, App. 35)

requirement is that the witness should have been so situated that *in the ordinary course of events he would have heard or seen the fact had it occurred.*" 2 WIGMORE ON EVIDENCE § 664 (3d ed. 1940). The foundation for this testimony arises from the witness' statement that he did not observe an unusual occurrence though he was in a position to do so.

In this case the government could have asked the bank officials to state their recollection of the seventeen transactions. An affirmative recollection on their part would have been the most probative evidence of the bank's behavior. On the other hand, if they denied any recollection of the seventeen transactions, the jury could infer that the bank relied on the false documents, assuming that the jury first found that the bank generally relied on such documents. But the jury cannot properly draw the inference of reliance until the government has established that the bank officials lack affirmative knowledge of the seventeen transactions. Because the government steadfastly declined to ask the bank officials about their actual knowledge, it did not establish a foundation for the drawing of the inference.

The theory of the government's case appears to have been that knowledge on the part of any bank officer of the falsities in the loan documents did not prevent the defendants from defrauding the bank. (J.A. 110-11, 115) In the government's view such knowledge was not chargeable to the bank as an institution; it would merely show that the knowing officer was an unindicted co-conspirator. (J.A. 110-11, 115) Yet, the bank's business is conducted through its officers. Their knowledge is the bank's knowledge. We do not dwell on the weakness of this theory because it runs contrary to basic principles of the law of agency and was quite properly rejected by the trial court. (J.A. 129-30) The reason that the government developed this curious position was apparently to avoid the need to question its own witnesses about their actual knowledge of the seventeen transactions.

In conclusion, the record shows that the bank and RCC enjoyed a long and mutually beneficial business relationship. (J.A. 88, 92-93, 103, 112-13) In this circumstance there is reason to suppose that the bank would depart from its customary practice in its business dealings with RCC.²⁰ The practical effect of condoning the inference was to relieve the government from proving an essential element of its case—instead of the government proving reliance, the defendants had to show non-reliance to escape conviction. While the trial court commented extensively on the inadequacy of the government's case on reliance, it erred in denying Reynolds' motion for a judgment of acquittal at the close of the government's case, renewed after the close of trial, on the ground that evidence on reliance was insufficient as a matter of law.

B. The Court Erroneously Failed To Grant Reynolds' Motion for a Judgment of Acquittal Because the Evidence Shows That the Bank Did Not Materially Rely on the False Loan Documents

Even if this Court should hold that the jury could properly infer the element of reliance from evidence of general practice, the evidence of general practice introduced in this case does not afford an adequate factual basis for drawing the necessary inference. Because of this deficiency in proof,

²⁰ Because the government blocked inquiry into the seventeen transactions, and defendants did not pursue it in their own case, the jury had no clear picture of what actually transpired. Circumstantial evidence in the record suggests, however, that the bank must have been aware that RCC was the real party in interest in each of the seventeen straw transactions. Harrison testified that in the relevant period interest on the construction loans was higher than on mortgage loans. (J.A. 102) In these transactions, however, the construction loans and mortgage loans bore the same annual rate of interest (6%). Thus, if the bank believed that someone other than RCC was the real party in interest in these transactions, it would have followed its general practice of granting the home loan at the reduced consumer rate. The bank did follow this general practice in at least one instance herein. One of the straws, Chesley, sold the property in his name to one Payne, a *bona fide* consumer purchaser. The bank thereupon refinanced this loan at the then prevailing consumer rate (5¼%). (J.A. 108)

the trial court erred in not granting Reynolds' motion for a judgment of acquittal at the close of the government's case, renewed after trial, on the basis of the insufficiency of the evidence to establish guilt beyond a reasonable doubt.

In the course of describing the bank's procedure for processing loan applications, Stoy testified that the bank committed all loans on the basis of a property appraisal undertaken by the bank's own appraisers. (J.A. 83, 88-89) Although both an appraisal report and a credit report were submitted to the loan committee, which then made a recommendation to the executive committee, the appraisal report alone influenced the bank's decision to commit loans:

The Court: [Were] the construction loans or [the mortgage] loans . . . made on other than the appraised value of the property?

Stoy: I would say they were made on the appraised value of the property.

Batchelor [counsel for defendant Leigh]: And that alone?

Stoy: Yes. (J.A. 91)

Harrison confirmed Stoy's testimony. (J.A. 104) As a consequence of the bank's reliance on appraisal reports, the bank made no effort to verify the credit disclosures accompanying loan applications. Stoy did not try to contact any of the seventeen applicants; he was not "required" to do so. (J.A. 86) According to Stoy, "[i]t was not the practice of [the bank] to investigate any credit. It was taken at face value whatever was there." (J.A. 87) Again, Harrison confirmed Stoy's testimony. (J.A. 104)²¹

²¹ It is a reasonable surmise that the government refused to inquire into the bank's reliance on the identity of the borrowers in the seventeen transactions because it had reason to believe such an inquiry might demonstrate that the bank officials did not rely on the false loan documents and in fact knew that RCC was the real party in interest in these transactions. As exhibits attached to Reynolds' motion for a new trial establish, the government had in its possession checks, ledger sheets, and loan account credit slips indicating that, as early as February 1963, the bank was receiving payments from RCC on some of the loans (as of that time, not all the loan transactions had been consummated) to straw parties. (Exhibits A-1 & A-2,

The reason the bank could afford a casual attitude toward an applicant's credit status was that the bank looked to the property, not the individual, for the security on its mortgage loan. It was the bank's general practice not to issue a loan on any house that exceeded seventy-five per cent of its appraised value. (J.A. 88) It obtained for itself, of course, the position of preferred creditor—its deed of trust was the first deed of trust encumbering the property. The bank thus enjoyed a safe margin of protection against a possible default on the mortgage payments.

It is against this financial background that this Court must measure the testimony of Stoy, reiterated by Harrison, that the bank would not consider a loan application if it knew the credit information was false. Perhaps not. Still, there is a lack of proof that the bank affirmatively acted on the credit information, especially in view of the bank officials' testimony that the bank did not check into the applicant's credit but instead relied on the appraisal report. (J.A. 83, 90-91, 104)

attached to motion of defendant Reynolds for a new trial, filed 7/10/69. (J.A. 4-5.) These payments came to the bank in one large check made by RCC, accompanied by the several payment books for the loans covered. Each check was in a total amount exactly sufficient to cover the separate monthly payments due from several different straw purchasers. The bank applied the large checks to the several loan accounts on which payments were due (the numbers of the loan accounts were inserted above the teller's endorsement); the ledger cards were corrected by the bank to reflect that the proper address for each mortgagor was RCC. (Ex. A-1, *supra*) The government chose to ignore the strong inference of the bank's knowledge that emanates from this documentation; it chose instead to take the position that the bank could acquire knowledge only through its "officers," and that "tellers" were not "officers." (T. 649) It seems unlikely, however, that a teller would not have called an officer's attention to this "irregularity." If an officer so learned of the practice, his knowledge is imputed to the bank. If an officer did not learn of this practice, it must have been because the teller did not consider it irregular, which serves to underscore the immateriality of the true borrower's identity, whether a real person, a straw, or RCC. Moreover, an uncontroverted affidavit in support of a motion for new trial showed that a bank officer would pick up from RCC and hand deliver the checks of RCC making monthly payments on the loans to the straw parties. (Steele affidavit, dated 7/9/69, attached to motion of defendant Reynolds for a new trial, *supra*.) It would be surprising if government agents had not interviewed this officer.

IV. THE TRIAL COURT ERRED IN SUSTAINING THE GOVERNMENT'S OBJECTIONS TO CROSS-EXAMINATION OF THE BANK OFFICERS ON THE LOAN TRANSACTIONS SET FORTH IN THE INDICTMENT.

As appears in the trial court's Post-Trial Memorandum & Order (App. 32), quoted in relevant part at page 27 of this brief, Stoy and Harrison, the bank officials, testified on direct examination about the bank's general practice in processing and approving loan applications. When defendants sought to ask on cross-examination whether the bank had followed the same practice in approving the seventeen loans, the trial court sustained the government's objection on the ground that the proposed line of questioning was not within the scope of direct examination and that defendants could introduce evidence of the bank's actual treatment of the loans as part of their case.²² (J.A. 87, 100)

The position taken by the government, and sustained by the trial court, confining the testimony of the bank officers to descriptions of the bank's general practices deprived the defendants of their right of cross-examination. The object of the cross-examination—to find out whether the bank followed the alleged general practice and actually relied on the truthfulness of the seventeen loan applications—focused on the central element in the case.

The government's case was such that the necessary element of reliance was established solely by the inference that the bank followed the general practice testified to in approving the seventeen loans. But the government prevented the defendants from determining through cross-examination the accuracy of the ultimate fact of reliance, which was the consequence of the inference. Thus, the government asked the jury to draw an inference from the bank officials' testimony, yet was unwilling to have tested before the jury the validity of the inference on the facts of this case.

²² As previously stated, defendants elected not to pursue this line of inquiry in presenting their case. See text, *ante*, p. 11.

The unfairness involved in this approach can best be illustrated by two hypothetical examples. Suppose, in a criminal case, a defendant charged with running a toll station takes the stand in his own defense, and testifies that it is his general practice to stop and pay tolls when required. No court, we maintain, would deny the government the right to ask him on cross-examination whether he ran the particular toll station. Or, in a civil automobile accident case, suppose the defendant testifies, as part of his case, that it is his general practice not to exceed the speed limit. Surely, no court would forbid cross-examination directed toward ascertaining his actual speed at the time of the accident. Such limitations would be contrary to the notion of meaningful cross-examination.

In a recent opinion this Court stressed that, although the trial court has some discretion in restricting cross-examination of a witness, "the trial judge may not restrict the right of cross-examination by the defense on a matter brought out before the jury on direct until that right has been 'substantially and fairly exercised.' Only then should judicial discretion intervene." *United States v. Pugh*, No. 23,216 (D.C. Cir., June 30, 1970), Slip Opinion, p. 6. See also *Alford v. United States*, 282 U.S. 687, 694 (1931); *Lindsey v. United States*, 77 U.S. App. D.C. 1, 2-5, 133 F.2d 368, 369-72 (1942) (Stephens, J.). In *Pugh*, a robbery prosecution, the defense was mistaken identity, and defendant's strategy encompassed an "exhaustive inquiry" into the story of each government witness. The victim and his friend testified on direct examination that they had gone to the place where the robbery occurred to visit a male friend. On cross-examination defendant asked whether they had really gone to visit a girl but the trial court sustained the prosecution's objection. This Court found error.

Since the Government deemed it important enough to ask [its witnesses] about the purpose of the visit in the early morning hours, it did not become irrelevant and immaterial when appellant's counsel chose to cross-

examine concerning the same subject. The purpose of [the] visit was material and relevant in setting the stage and giving the surrounding for the robbery which later occurred, and inquiry by the defense was legitimate for this objective. (Slip Opinion, p. 3)

In the context of the *Pugh* facts, however, this Court held that the error did not require reversal.

Other courts have not hesitated to reverse judgments when, in contrast to *Pugh*, the proposed line of cross-examination sought, as here, to elicit testimony directly bearing on the criminal acts charged. A case closely in point is *United States v. Kelley*, 314 F.2d 461 (6th Cir. 1963). In *Kelley*, defendant was charged with failing to register and pay the special wagering tax imposed by 26 U.S.C. § 7203. The government's witness testified that he made approximately 65 bets with defendant over a three-year period. On cross-examination defense counsel was not allowed to ask the witness to describe specifically any five instances. The Court of Appeals reversed; it held that the question was proper to test the memory and truth and veracity of the witness. *Kelley, supra*, at 462-63. See also *Ford v. United States*, 210 F.2d 313, 318-19 (5th Cir. 1954).

In the instant case the proposed cross-examination would not have disrupted the orderly conduct of the trial. The jury could scarcely have been confused by the additional answers in appraising the witnesses' testimony. The point at issue, the actual reliance of the bank, was one on which the government had the burdens of proof and of presenting evidence. The questions were directly within the scope of direct examination; they related to the precise issue raised by the direct testimony of the witnesses Stoy and Harrison.²³ The trial court's evidentiary rulings, holding that

²³ Moreover, the proposed line of cross-examination was proper as a challenge to the credibility of the bank officials' testimony describing the bank's general practice. If the supposed general practice was not followed in these seventeen transactions, the jury could discount their testimony as to what the general practice was.

the proposed line of cross-examination was beyond the scope of direct, were in error which in the context of this case was prejudicial.

CONCLUSION

Appellant Reynolds respectfully prays that the judgment of conviction be reversed, and that the case be remanded with directions to enter a judgment of acquittal or alternatively to dismiss the indictment, or to grant a new trial.

Respectfully submitted,

WILLIAMS & CONNOLLY

VINCENT J. FULLER

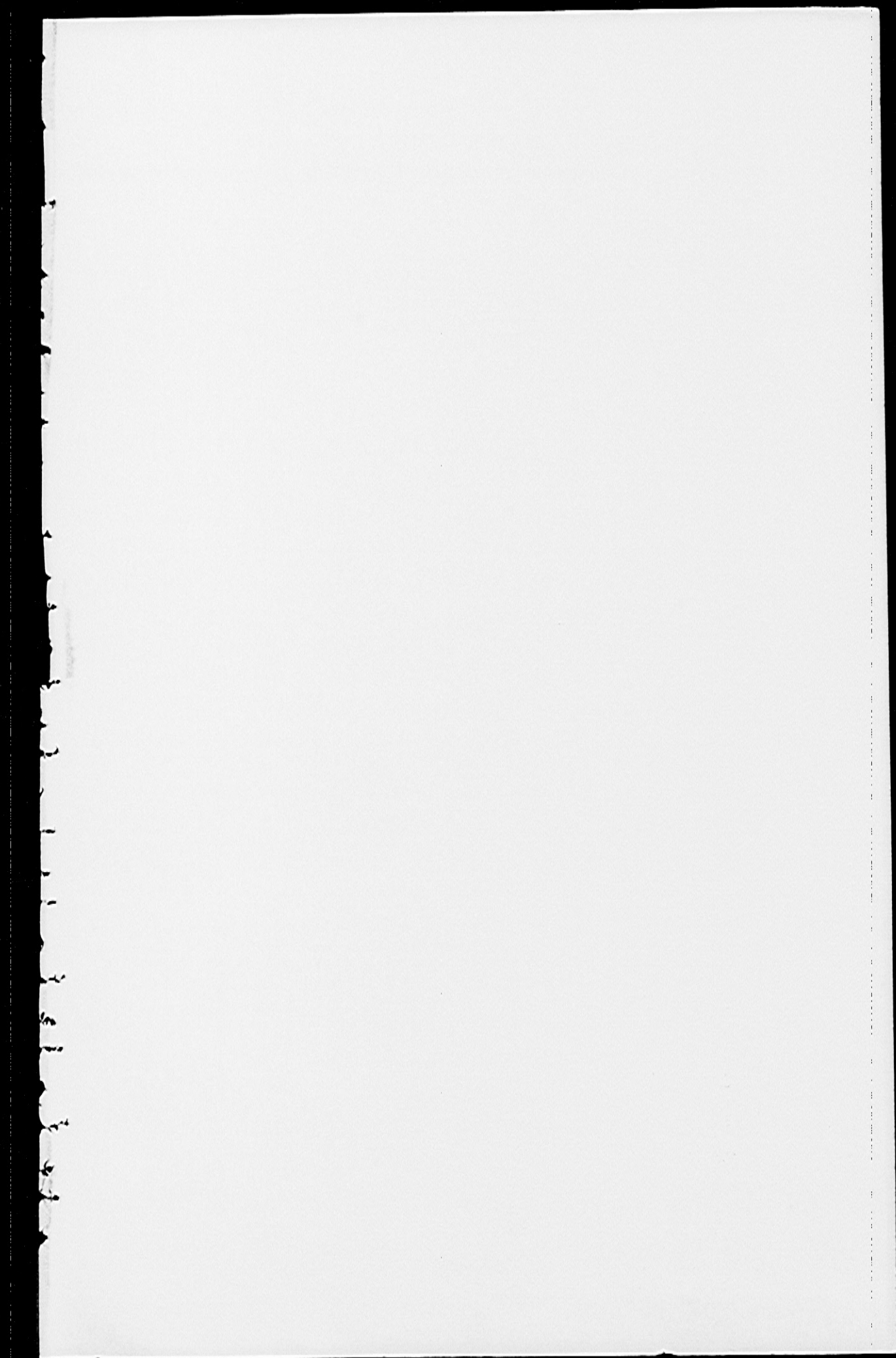
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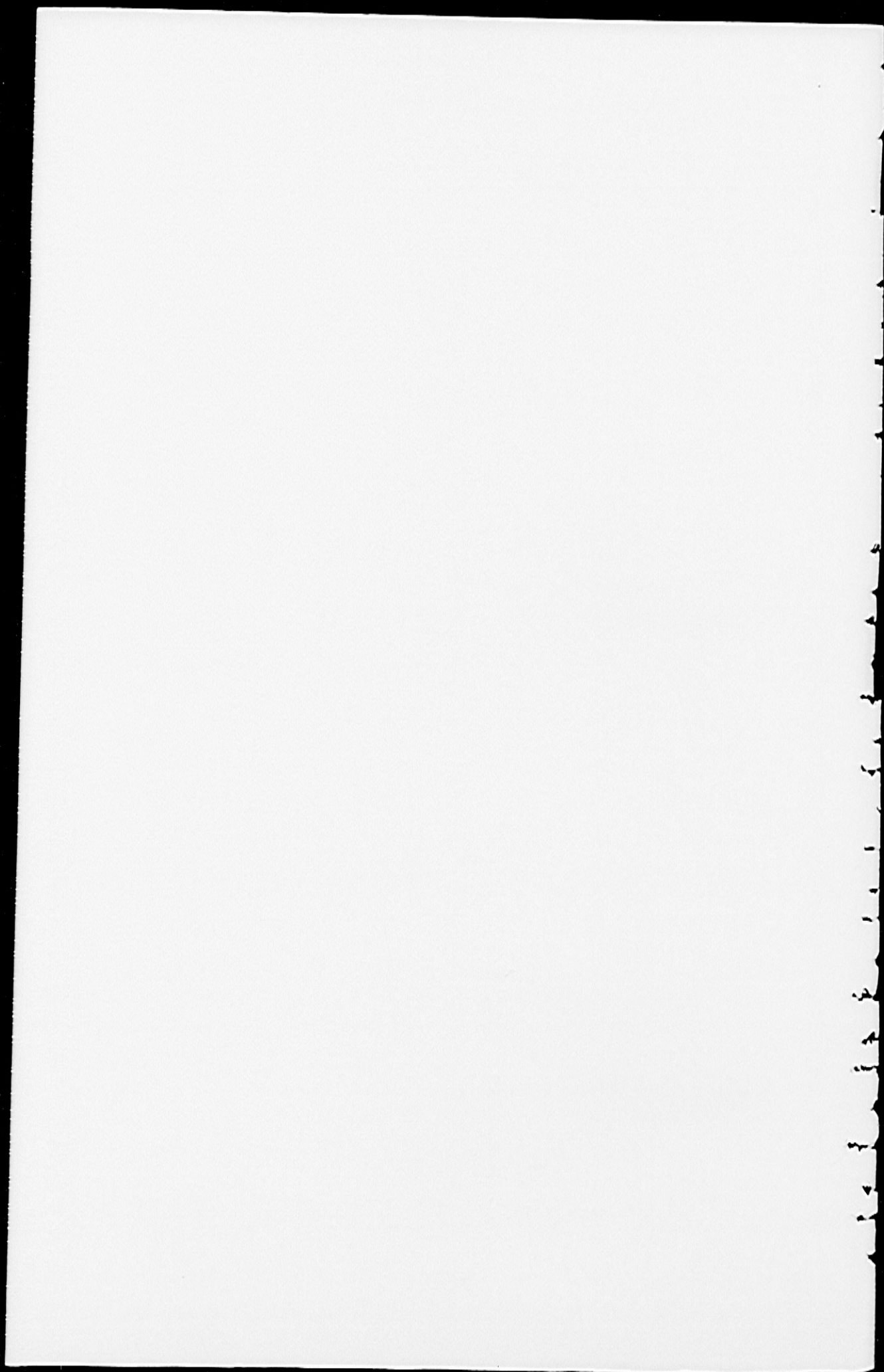
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APPENDIX

1. District Court's Opinion Denying Defendants' Motion to Suppress.**September 5, 1968.**

AUBREY E. ROBINSON, JR., District Judge.

Defendants have been charged in a thirteen-count indictment with violating Section 371 of Title 18 of the United State Code and Section 1301 and Section 1401 of Title 22 of the District of Columbia Code by conspiring to obtain loans from the Eastern Savings and Loan Association of the District of Columbia by uttering forged documents. Defendants have filed Motions to Suppress documentary evidence and oral statements. A hearing on the motions to suppress was held on June 3 and 4, 1968, at which time testimony was taken and additional evidence received. Transcripts of the hearing have been filed. Defendants vigorously contend that each was not adequately advised of his constitutional rights under the Fourth, Fifth and Sixth Amendments of the Constitution of the United States.

From the evidence, the following facts are found:

(1) Prior to the year 1963, the Internal Revenue Service and the United States Department of Justice formed a special project to investigate alleged bribery among certain officials of the County of Fairfax, Virginia. Specific focus was directed to the Fairfax County Board of Supervisors, of which the Defendant, A. Clairborne Leigh, was formerly chairman. This special project was known as the "Metro Project." It was staffed by revenue and special agents of the Internal Revenue Service and received legal assistance from the Justice Department through its Organized Crime and Racketeering Section.

(2) In June of 1963, William Hansell, a revenue agent of the Internal Revenue Service, was directed by the Director of the "Metro Project", Mr. Oral Cole, to make an exam-

ination of the income tax return of Defendant Leigh for the tax year 1960. In connection with that examination, copies of cancelled checks, bank statements and deposits in Leigh's files were made by the agent with Leigh's permission. At this time, no mention was made by the agent of any criminal investigation or of the "Metro Project." On January 20, 1964, Special Agent McElroy of Internal Revenue Service, accompanied by Agent Hansell, visited Defendant Leigh's office. At that time, Defendant Leigh was first advised of his rights and, subsequent to that date, information was obtained from Leigh pertaining to settlement files on property transactions involving the Reynolds Construction Company. These settlement files were scrutinized in detail by the "Metro Project" investigators.

(3) Prior to June of 1963, Defendants Leigh and Rogers had been law partners. At the time of Agent Hansell's first visit to the office of Defendant Leigh, the office files and records of the partnership were partially in the possession of Rogers, the law partnership having been previously dissolved. Unable to secure all of the desired information concerning the records of the Leigh and Rogers partnership from the files in possession of Leigh, Special Agent McElroy went to the office of Defendant Rogers in February, 1964. McElroy informed Rogers that Leigh was being investigated and that he wanted access to the Leigh and Rogers partnership records which were in the possession of Rogers. At this time, Special Agent McElroy did not give to Rogers any warning concerning his constitutional rights. He received from Rogers certain documents consisting of settlement files from the Leigh and Rogers partnership. In October and November, 1964. McElroy conferred with Rogers concerning the "straw" transactions involving Reynolds Construction Company. In April of 1965, Internal Revenue Agent Shelton was assigned to audit the personal tax returns of Rogers.

(4) In order to ascertain the details of financial transactions between Leigh and Reynolds pertaining to certain

properties and sales contracts, Internal Revenue Agent Evangelist of the "Metro Project" was instructed to make an audit of certain tax returns of Reynolds Construction Company, a corporation of which Defendant Reynolds was the president. The personal returns of Walter J. Reynolds and his wife were also audited. The audit commenced in March, 1964. All corporate financial records of the Company were obtained from Reynolds on request. Reynolds was given no warnings pertaining to his constitutional rights at this time.

(5) The audit of the Leigh and Rogers settlement files revealed that Defendant Harlan Freeman had received fees in connection with certain "straw" transactions which were of great interest to the "Metro Project" in connection with its investigation of Leigh. Agent Evangelist, contemporaneous with his audit of the Reynolds Construction Company, began an audit of Freeman's tax returns on July 6, 1964. Freeman was advised by Special Agent F. O. Stevenson on February 11, 1966, as to his constitutional rights as a subject of a criminal investigation.

(6) No agent of the Internal Revenue Service examined or removed any books, records or other documents from Defendant Stamp or Defendant Dienelt in relation to facts involved in the present indictment. Nor did any agent interview either of these defendants with regard to the transactions involved in this indictment. The Defendant Stamp's books were audited in 1964, but the material examined was entirely unrelated to the present indictment.

Defendants Leigh, Rogers, Reynolds and Freeman make two separate but related arguments in support of their motions to suppress. First, they assert that each was entitled to "*Miranda* warnings"¹ of his constitutional rights

¹ In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that a criminal suspect "... must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda, supra* at 479.

at the time of the government agent's initial visit, or at least at some point prior to the time at which such warnings were given, and that failure to give these warnings was a violation of defendants' Fifth and Sixth Amendment rights. Secondly, because "Metro Project" was created to investigate criminal bribery, defendants argue that representations by the Government that its purpose was to make civil tax audits constituted fraud and deceit in the use of the statutory authority granted by Section 7602 of the Internal Revenue Code,² and that the inspection of books and records under the guise of the authority granted by that statute constituted unconstitutional searches and seizures under the Fourth Amendment. Defendants Stamp and Dienelt assert that indictments against them were obtained as the result of evidence unlawfully secured from Defendants Leigh, Rogers, Reynolds and Freeman and are thus tainted by the unconstitutional actions of the Government. They, therefore, rely on the arguments of their co-defendants in support of their motions to suppress.

The Government responds, first, that while there is always the possibility that criminal prosecutions may result from

² Section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602 (1964), provides: For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

- (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
- (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
- (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

a civil tax audit, there is no need to give "*Miranda* warnings" at the initial stages of a tax investigation. In addition, it asserts that since its original purpose in seeking information from Defendants Rogers, Reynolds and Freeman was in connection with its investigation of Leigh, that Rogers, Reynolds and Freeman were not, in the early stages of the investigation, entitled to "*Miranda* warnings." Secondly, the Government argues that there was no misrepresentation of the Government's purpose to any of the defendants, because "Metro Project" was legitimate investigatory machinery created for the dual purpose of investigating taxpayers' returns and seeking information about bribery among public officials in Fairfax County.

For purposes of analysis, the *Miranda* argument and the search and seizure issue are approached separately.

We hold that in a tax investigation "*Miranda* warnings" are required when that investigation reaches the accusatory stage. At that point, our adversary process begins to operate and the potential defendant must be advised of his constitutional rights. See *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Turzinski*, 268 F.Supp. 847 (1967). In the case at bar, agents of the Internal Revenue Service advised defendants of their rights at the appropriate times under this test.

In *Escobedo*, the Court held

... that where ... the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment ... and that no state-

ment elicited by the police during the interrogation may be used against him at a criminal trial. *Escobedo v. Illinois*, *supra* at 490-91.

The Court went on to note:

We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer. *Escobedo v. Illinois*, *supra* at 492.

These concepts were developed more fully in *Miranda*, where the Court held:

... the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona*, *supra* at 444.

Then in an already-famous footnote, the Court added, "This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." *Miranda v. Arizona*, *supra* at 444 n. 4.

The threshold question is whether the *Escobedo-Miranda* doctrine can ever apply to criminal tax investigations. The great majority of federal courts which have considered this question, including several courts of appeal, have held that *Miranda* and *Escobedo* do not apply to tax investigations unless the taxpayer is actually in custody or deprived of his freedom in some significant way, that is, unless the strictly construed elements of *Miranda* are present. *Spinney v. United States*, 385 F.2d 908 (1st Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); *Frohmann v. United States*,

380 F.2d 832 (8th Cir.), *cert. denied*, 389 U.S. 976 (1967); *Schlinsky v. United States*, 379 F.2d 735 (1st Cir.), *cert. denied*, 389 U.S. 920 (1967); *United States v. Maius*, 378 F.2d 716 (6th Cir.), *cert. denied*, 389 U.S. 905 (1967); *United States v. Mancuso*, 378 F.2d 612, *modified*, 387 F.2d 376 (4th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968); *Selinger v. Bigler*, 377 F.2d 542 (9th Cir.), *cert. denied*, 389 U.S. 904 (1967); *Morgan v. United States*, 377 F.2d 507 (1st Cir. 1967); *Rickey v. United States*, 360 F.2d 32 (9th Cir.), *cert. denied*, 385 U.S. 835 (1966); *Kohatsu v. United States*, 351 F.2d 898 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966); *United States v. Spomar*, 339 F.2d 941 (7th Cir. 1964), *cert. denied*, 380 U.S. 975 (1965); *United States v. Jaskiewicz*, 278 F.Supp. 525 (E.D.Pa. 1968); *United States v. Mackiewicz*, 274 F.Supp. 805 (D.Conn. 1967); *United States v. Neves*, 269 F.Supp. 158 (S.D.N.Y. 1967); *United States v. Gleason*, 265 F.Supp. 880 (S.D.N.Y. 1967); *United States v. Hill*, 260 F.Supp. 139 (S.D. Cal. 1966); *United States v. Fiore*, 258 F.Supp. 435 (W.D.Pa. 1966).³

In rejecting the application of *Escobedo* and *Miranda* to tax crimes, most of these cases attempt to distinguish tax

³ The only recent comment by the Supreme Court about the rights of suspects of tax crimes to be advised of their constitutional rights, *Mathis v. United States*, 391 U.S. 1 (1968), involved a case where petitioner was in jail for an entirely separate offense when documents and oral statements were obtained from him by an Internal Revenue Agent. Thus, it was unnecessary for the Court to determine whether physical custody was a prerequisite to the application of *Miranda* principles to tax cases, for in this unusual case there was physical custody. The Court held only:

It is true that a "routine tax investigation" may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. In fact, the last visit of the revenue agent to the jail to question petitioner took place only eight days before the full-fledged criminal investigation concededly began. And as the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecution. We reject the contention that tax investigations are immune from the *Miranda* requirements for warnings to be given a person in custody. *Mathis*, *supra* at 4.

investigations from other criminal cases. Some hold that "Miranda warnings" are not required because of the difficulty in determining the inception of the adversary process, that is, because the distinction between the investigatory and the accusatory stages "may not be entirely apposite to criminal tax investigations." *United States v. Fiore*, 258 F. Supp. 435, 440 (W.D.Pa. 1966). Other courts find an important difference in the fact that in the normal criminal investigation a crime is known to have occurred and the police are seeking a suspect, while in the tax case the suspect is known and what must be determined is whether a crime has actually been committed. *Kohatsu v. United States*, 351 F.2d 989 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966). These courts hold that this distinction obviates the requirement of giving "Miranda warnings" in tax cases. See Note, 21 S.W.L.J. 399 (1967). Most courts which have held the "Miranda warnings" unnecessary have limited the requirement to situations in which the subject is in physical custody. This reasoning is based on what one court referred to as the "clear intendment" of *Miranda* that the requirement of a warning is "to be confined to situations of 'custodial interrogation'." *United States v. Fiore*, 258 F.Supp. 435, 440 (W.D.Pa. 1966).

The illogic of these artificial distinctions between investigations for tax crimes and investigation for other crimes is apparent. As in other criminal cases, there comes a time in the criminal tax investigation when the focus is on a prime suspect of a specific crime. There comes a time when the process passes from the investigatory stage to the accusatory stage. At that point, however ill-defined, the suspected tax criminal is no less entitled to be advised of his constitutional rights than any other suspected criminal. *United States v. Wainwright*, 284 F.Supp. 129 (D.Colo. 1968); *United States v. Turzynski*, 268 F.Supp. 847 (N.D. Ill. 1967); *United States v. Kingry*, 19 A.F.T.R.2d 762 (N.D.Fla. 1967); *United States v. Schoenburg*, 19 A.F.T.R. 2d 348 (D.Ariz. 1966). Judge Will's Memorandum Opinion

in *United States v. Turzynski, supra*, is an excellent analysis of the reasoning which compels this conclusion. The opinion states:

We hold that once a taxpayer becomes the subject of a criminal tax investigation, as evidenced by the referral of the investigation to the Intelligence Division or otherwise, our adversary process of criminal justice has become directed against him as a potential criminal defendant. Any evidence obtained from him is admissible only if the taxpayer furnished it after knowingly and voluntarily waiving his constitutional rights and privileges. *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

To hold otherwise would lead to the anomalous conclusion that a person suspected of bank robbery, sale or [sic] narcotics, murder, rape or other serious crime is entitled to greater protection of his constitutional rights than a person suspected of violating the internal revenue laws. For when the silent transition from civil to criminal investigation takes place in a tax case, the taxpayer being interrogated and asked to furnish his books and records is just as surely a price suspect and candidate for criminal prosecution as the individual under interrogation as a suspect for other crimes. *United States v. Turzynski, supra* at 850-51.

Turzynski refuted the two major arguments against application of *Escobedo-Miranda* principles to tax cases. First, it criticized the distinction between the case where the criminal is unknown and the case in which the crime is unknown, since the purpose of the interrogation, in both instances, is to incriminate the suspect being questioned. *United States v. Turzynski, supra* at 852-53.

This distinction between a criminal tax investigation where the taxpayer is suspected of a tax fraud not yet fully identified and a criminal investigation where a known violation of the law is attempted to be linked to a particular suspect is logically irrelevant for purposes of determining when the adversary process has

begun, i.e., when the investigative machinery of the government is directed toward the ultimate conviction of a particular individual, and when, therefore, a suspect should be advised of his rights. *United States v. Turzynski*, *supra* at 852.

Secondly, *Turzynski* condemned the tendency of many courts to give the concept of custody "an independent constitutional significance which is belied by a careful reading of the opinion [*Miranda*]." *United States v. Turzynski*, *supra* at 852. The court reasoned that *Escobedo* and *Miranda* were not intended to raise the requirement of custody to a constitutional level. Rather, they had been concerned with the inception of the adversary process. *United States v. Turzynski*, *supra* at 853. See Note, 53 Iowa L. Rev. 957, 961 (1968). Judge Will noted that the Supreme Court in *Miranda*

... was not concerned solely with the protection of constitutional rights in a custodial atmosphere. The Court enunciated the broader principle that when the investigative power of the government is directed toward an individual with the intent to obtain incriminating evidence from him, that individual should be afforded an opportunity knowledgeably to exercise his constitutional rights. *United States v. Turzynski*, *supra* at 852.⁴

The better reasoned point of view requires "*Miranda* warnings" in criminal tax cases, despite the absence of

⁴ In commenting on the irrelevance of custody to tax crimes, one commentator has noted:

With respect to many white-collar crimes, such as tax frauds, it is likely that the Court will revert to the broader *Escobedo* test in determining the point at which the adversary process begins. In that event, physical restraint would not be regarded as prerequisite to application of the *Miranda* safeguards.

... Plainly, the privilege against self-incrimination is seriously in jeopardy throughout a criminal tax investigation. The absence of physical restraint does not obviate or minimize the need for safeguards to protect the privilege. Lipton, *Constitutional Rights in Criminal Tax Investigations*, 53 A.B.A.J. 517, 518-19 (1967).

physical custody, when the accusatory stage is reached and the adversary process begins to operate.

Recognizing that differences between criminal tax cases and other types of criminal cases should not prevent application of the *Miranda-Escobedo* doctrine at the proper time in tax cases, we have established the proposition that *Miranda* should not be applied mechanistically so as to require warnings of constitutional rights only when there is actual physical custody. Such a view would virtually preclude the giving of these warnings in tax cases, because physical custody is rarely a stage in the process. Similarly, we reject the application of yet another mechanical approach in place of custody in order to determine when the adversary process begins [sic], namely the entrance into the case of the Internal Revenue special agent. Unfortunately, a narrow reading of *Turzynski* permits the inference that entrance of the special agent marks the clear line between the investigatory and the accusatory stages, for *Turzynski* holds that

... once a taxpayer becomes the subject of a criminal tax investigation, *as evidenced by the referral to the Intelligence Division or otherwise*, our adversary process of criminal justice has become directed against him as a potential criminal defendant. *United States v. Turzynski, supra*, at 850. (Emphasis added.)

While referral to the Intelligence Division and the resultant involvement of the special agent may, in many cases, signify the inception of the adversary process, it would be too great an extension of *Miranda* to automatically require warnings of constitutional rights at this point. *Turzynski* was not concerned primarily with constitutional questions which are said to arise simply because the special agent enters the picture. It, like *Miranda*, was concerned with the "broader principle" that when the investigative power of the government focuses on the individual "with the intent to obtain incriminating evidence from him, the individual should be afforded an opportunity knowledgeably to

exercise his constitutional rights." *United States v. Turzynski*, *supra* at 852. This point in time may or may not coincide with the entrance into the case of the special agent. As one court properly noted:

Although a Special Agent is the police arm of the Internal Revenue Service and conducts inquiries for possible criminal violations, the mere entry of such an agent into the case does not transform it from an investigatory status to an accusatory one. *United States v. Gower*, 271 F.Supp. 655, 659 (M.D.Pa. 1967).

We reject defendants' argument that they were entitled to be warned of their constitutional rights at the outset of the investigation merely because special agents of the Internal Revenue Service were involved in "Metro Project" from the beginning. Defendants were entitled to such warnings only when the investigative power of the government focused on them as prime suspects of criminal activity, that is, at the inception of the adversary process. To determine when that process began, the pertinent inquiry is not whether special agents were involved but whether the evils which *Miranda* sought to eliminate were a real threat to defendants and to their constitutional rights.

Miranda sought to guard against "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." *Miranda v. Arizona*, 384 U.S. 436, 445 (1966). It was concerned with the police tactic of thrusting one into unfamiliar surroundings, shrouded in privacy and secrecy, where there is coercion inherent in the very atmosphere. *Miranda v. Arizona*, *supra* at 449-50, 457. It recognized that coercion can be psychological as well as physical, and that psychological pressures can often be as dangerous as physical pressures.⁵

⁵ Indeed, the psychological pressures can be greater in tax cases than in most criminal cases, for "[t]he suspected tax evader is less likely to realize the consequences of cooperation than is the individual who is arrested and taken into custody for committing a violent crime." Note, 20 Ala.L.Rev. 158, 162 (1967).

Miranda v. Arizona, *supra* at 436, 448. In addition, *Miranda* was concerned with whether, in light of these psychological factors, the individual was "deprived of his freedom of action in any significant way." *Miranda v. Arizona*, *supra* at 444. As in other criminal cases, it is these evils which must be combated in the criminal tax case.

We find that the evils which *Miranda* sought to eliminate were not present in the instant case at the times when defendants contend that they were entitled to be advised of their constitutional rights. At the initial contacts with defendants by Internal Revenue agents, the general atmosphere was not coercive by its nature, for the interviews were held "not in some alien environment," but in defendants' own offices. *O'Toole v. Scafati*, 386 F.2d 168, 170 (1st Cir. 1967), *cert. denied*, 390 U.S. 985 (1968). See also *United States v. Essex*, 275 F.Supp. 393, 398 (E.D.Tenn. 1967). There is nothing to indicate that defendants had been deprived of their freedom of action in any way or were not free to leave the interviews (or ask Internal Revenue agents to leave) at any stage. Indeed, they went about their personal business, unfettered, between interviews with government agents. See *Hicks v. United States*, 127 U.S. App. D.C. 209, 212-13, 382 F.2d 158, 162 (1967); *United States v. Knight*, 261 F.Supp. 843, 844 (E.D.Pa. 1966). Defendants in the case at bar were in much the same situation as the defendant in *United States v. Hill*, 260 F.Supp. 139 (S.D.Cal. 1966), where the suppression motion was denied:

Defendant in the instant case was never "deprived of his freedom of action in a significant way." . . . His meetings with the agents were by appointment only; except for the occasion on which the constitutional warnings were given, all meetings were in defendant's offices; he was free to come and go as he pleased and in fact did tend patients while his records were being reviewed. This situation is in direct contrast with the techniques of interrogation described in various police manuals relied upon in *Miranda*.

. . . .

... They told the defendant that they wished to examine his financial records in order to effectively investigate his tax returns. The defendant was under no compulsion. He voluntarily produced his records and answered the good-faith questions put to him by the agents. *United States v. Hill, supra* at 142-43.

In sum, until the accusatory stage is reached and the underlying evils which *Miranda* sought to combat are present, warnings of constitutional rights are not required. The mere fact that criminal prosecutions may result from a civil tax audit does not trigger the inception of the accusatory stage. It is not until there is a prime suspect of a specific crime, and the tactics condemned by *Miranda* are likely to be employed to obtain self-incriminatory statements or records, that the accusatory stage is reached. This test is difficult to apply in tax cases, but it is nevertheless the applicable standard under *Miranda* and *Escobedo*.

The cases assume that interrogation is relatively free as between government and taxpayer until some ill-defined zone is reached in which fairness requires the government to alert the defendant that the theoretical risk of a criminal prosecution implicit in any investigation of an imperfect return has become a matter of pointed interest on the part of the government, whether or not the government has resolved to proceed. At some point the Government's further questions may become an attempt to take testimony in aid of prosecution rather than as part of an investigation. *United States v. Carlson*, 260 F.Supp. 424, 428 (E.D.N.Y. 1966).

In the instant case, however, defendants argue that there was more than the mere possibility that criminal prosecutions would follow the civil tax audits. They point to the existence of "Metro Project" as evidence of this. So far as their *Miranda-Escobedo* arguments are concerned, the Court need only note that those cases were in no way intended to "preclude police from carrying out their traditional investigatory functions." *Miranda v. Arizona*, 384

U.S. 436, 481 (1966). See also, *Escobedo v. Illinois*, 378 U.S. 478, 492 (1968). "Metro Project" was a tax-related investigatory technique in the spirit of police investigatory methods left intact by *Miranda*.⁶

From the foregoing analysis, it follows that "*Miranda* warnings" are required in tax cases only when the underlying evils which *Miranda* sought to guard against arise. In each case, the Court must inquire as to when the process passed from the investigatory to the accusatory stage, when the defendants became prime suspects of specific crimes, when they were subjected to the psychologically coercive atmosphere of government interrogation or demands for financial records, and when their freedom of action was significantly infringed. When one or more of these situations exist, the Internal Revenue Service is required to warn defendants of their constitutional rights, for it is then that the Service knows or reasonably should know of the likelihood of criminal involvement in particular transactions which may become the subject of an indictment. Viewing *Miranda* in this light, we hold that Defendants Leigh, Rogers, Reynolds and Freeman were not entitled to be advised of their constitutional rights at the time of the first contact with them by the Internal Revenue Service or, indeed, at any point in time earlier than that at which such warnings were in fact given.

When Defendant Leigh was first contacted by the Internal Revenue Service in June of 1963, attention had not focused on him as the suspect of a particular crime. The primary purpose of Agent Hansell's visit to Leigh's office was to make a civil tax audit. At this initial meeting, there was no coercion of any kind nor any of the other evils condemned in *Miranda*. In December of 1963, Agent Hansell first thought he might have uncovered evidence of crime in Leigh's books. As a result he referred the case to the In-

⁶ We shall consider the relevance of the existence of "Metro Project" to defendants' Fourth Amendment rights *infra*, at pp. 23-28.

telligence Division. While Hansell suspected a crime, to wit bribery, different from the crime for which Leigh was ultimately indicted, the accusatory stage had nevertheless been reached. At any subsequent interview, the Government would be searching for evidence of crime and might employ the tactics condemned in *Miranda*. The underlying concerns of *Miranda* were now present as to Defendant Leigh. At the very next interview with Leigh, on January 20, 1964, the Government properly advised him of his constitutional rights. This was the first point in time when "Miranda warnings" were required. Since the evidence which Defendant Leigh seeks to have suppressed was all acquired prior to this time, his motion must fail on Fifth and Sixth Amendment grounds.

The original purpose of Internal Revenue Service interviews with Defendants Rogers, Reynolds and Freeman was in connection with the criminal investigation of Leigh. The Service was conducting bona fide civil audits of Rogers, Freeman and Reynolds, with the additional purpose of determining whether their returns reflected any transactions with Leigh which might aid in its investigation of Leigh. However, Rogers, Reynolds, and Freeman were not the subjects of criminal investigations, even though they were contacted, in some instances, by special agents rather than by revenue agents. As a result, the evils with which *Miranda* was concerned had not yet arisen,⁷ and there was no requirement of advising Rogers, Reynolds and Freeman of their constitutional rights.

In March of 1964, the Internal Revenue Service, from documents they had received from Rogers, Reynolds and Leigh, became aware of certain "straw" transactions involving these defendants and Leigh. At this point, however, it had no reason to believe that criminal conduct was

⁷ The record indicates that the initial contact by agents of the Internal Revenue Service with Defendants Rogers, Reynolds and Freeman occurred in February 1964, March 1964 and July 1964, respectively.

involved in these transactions, but thought that they might be relevant to its bribery investigation of Leigh. When the Government sought to ascertain further details of the "straw" transactions, it discovered that several of the "straw" parties had no knowledge of the transactions and had not signed the documents. This development occurred in December, 1965. For the first time, the Government realized that the documents it had obtained in connection with civil tax audits of Rogers, Reynolds and Freeman, and in furtherance of its bribery investigation of Leigh, were permeated with evidence of criminal forgery, the subject of the present indictment.

It is at this point, December of 1965, and not sooner, that the accusatory stage was reached as to Defendants Rogers, Reynolds and Freeman. Only then did these three defendants become prime suspects of criminal activity. At any subsequent interviews with these defendants, the Government would be searching for evidence of crime and might employ the tactics condemned in *Miranda*. Indeed, at the very next interviews with Defendants Rogers and Freeman, March 22, 1966 and February 11, 1966 respectively, the Government advised them of their constitutional rights. The record shows no interview with Defendant Reynolds subsequent to December, 1965. Since the evidence which these defendants seek to have suppressed was all acquired prior to these dates, their motions must fail on Fifth and Sixth Amendment grounds.

Defendants' second argument is based on the Fourth Amendment's prohibition against unreasonable search and seizure. They contend that the very existence of "Metro Project" indicates that the original purpose of the Internal Revenue Service was to investigate criminal activity, that representations by the Government that its purpose was to make civil tax audits therefore constituted fraud and deceit in the use of the statutory authority granted by Section 7602 of the Internal Revenue Code, and that the inspection of books and records under the guise of the authority

granted by that statute constituted unconstitutional searches and seizures.

Defendants are correct in asserting that a search for criminal conduct under the guise of an examination for purely civil purposes is unconstitutional. *United States v. Guerrina*, 112 F.Supp. 126 (E.D.Pa. 1953), *modified on other grounds*, 126 F.Supp. 609 (E.D.Pa. 1955); *United States v. Lipshitz*, 132 F.Supp. 519 (E.D.N.Y. 1955). As Judge Clary noted in *Guerrina*:

I can see no difference between a search conducted after entrance has been gained by stealth or in the guise of a business call, and a search for criminal purposes conducted under the guise of an examination for purely civil purposes . . . [Defendant] was deluded into giving consent to the examination of his papers and records and his action in so doing cannot be said to be voluntary in so far as making available his papers for purpose of investigation to establish fraud for criminal prosecution purposes. *Guerrina, supra* at 129.

However, the record in the instant case does not support the contention that a civil tax statute was used in a deceitful manner to obtain evidence in a criminal investigation. There was no unreasonable search and seizure under the Fourth Amendment of the Constitution.

Section 7602 of the Internal Revenue Code is a civil tax statute which provides, in part:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any Internal Revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

- (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

. . .

If the Internal Revenue Service used the civil investigatory authority granted them by this statute for the investigation of purely criminal matters, suppression of the evidence so obtained would be required. However, if the Government was interested in *both* civil tax liability and criminal conduct, or solely in civil tax liability which later gave rise to evidence of crime, it was proper to operate under the authority of Section 7602. *McGarry v. Riley*, 363 F.2d 421 (1st Cir.), *cert. denied*, 385 U.S. 969 (1966); *Wild v. United States*, 362 F.2d 206 (9th Cir. 1966); *United States v. Sclafani*, 265 F.2d 408 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959); *Boren v. Tucker*, 239 F.2d 767 (9th Cir. 1956). "It should be noted that the statute under consideration [§ 7602], by its language does not limit the examination it authorizes *solely* to the issue of correctness." *Boren, supra* at 772. Referring to another paragraph of Section 7602, which authorizes examination of books and witnesses pursuant to summons, one court noted, "That the co-existence of criminal and civil investigations does not vitiate a Section 7602 summons seems too well established to require more than reference to the authorities." *McGarrey v. Riley, supra* at 424. As the summons may be enforced under Section 7602(2) "notwithstanding the fact that the information might also be used in a criminal prosecution," *Wild v. United States, supra* at 209, so may the statutory authority of Section 7602(1) be used when the Government is interested in both civil and criminal tax conduct, so long as the statute is not used *solely for criminal purposes*. The record does not support the allegation that the tax statute in this case was used for investigation of purely criminal conduct.

Since defendants' books and records were examined under the authority of Section 7602 and not pursuant to a search warrant, the Court recognizes that the Government has the burden of establishing voluntary consent, "free from duress or coercion, an unequivocal, specific, and intelligently given consent." *United States v. Mackiewicz*,

274 F.Supp. 805, 808 (D.Conn. 1967). Since we find that the original purpose of the Government was to conduct a civil tax audit, that its investigation did not involve fraud or deception in the use of a civil tax statute, and that it made no misrepresentation of its purpose to defendants, we hold that the Government has met its burden of proving voluntary consent on the part of all defendants.

Our final point of inquiry concerns defendants' argument that there were forms of deception involved here more subtle than the fraudulent use of a civil tax statute, yet so unfair as to vitiate the consent given to examine books and records. The following authorities are cited in support of our finding that there was no deception of this kind.

When a taxpayer is not aware of his constitutional rights, his subjective lack of knowledge of such rights does not vitiate the voluntary surrender of his tax records to a revenue agent and does not violate his right to withhold his private records, so long as the agent made no misrepresentation as to his purpose in requesting the records. *United States v. Spomar*, 339 F.2d 941, 943 (7th Cir. 1964), *cert. denied*, 380 U.S. 975 (1965). There is no deception inherent in the agent's truthful description of his purpose as a "routine audit", *United States v. Sclafani*, 265 F.2d 408, 415 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959), nor does such a statement constitute a promise that only civil liability will be considered regardless of what the examination reveals. *Turner v. United States*, 222 F.2d 926, 932 (4th Cir.), *cert. denied*, 350 U.S. 831 (1955). Similarly, there is no fraud simply because the agent fails to advise the taxpayer that he is engaged in a "joint investigation" involving special agents and representatives of the Justice Department. *Badger Meter Manufacturing Company v. Brennan*, 216 F.Supp. 426, 431 (E.D. Wisc. 1962), *cert. denied*, 373 U.S. 902 (1963). Indeed, it has been held that the mere fact that the Intelligence Division was involved or "conducted a preliminary investigation undisclosed to the defendant does not constitute fraud or misrepresentation."

United States v. Remolif, 227 F.Supp. 420, 424 (D.Nev. 1964). Finally, it is clear that the Government is not guilty of fraud or deceit by failing to apprise the subject of the exact nature of the investigation or of any change in the character of the investigation. *United States v. Light*, 394 F.2d 908, 914 (2d Cir. 1968); *United States v. Neves*, 269 F.Supp. 158, 162 (S.D.N.Y. 1967).

In sum, we find that there was neither fraud or deceit in the use of a civil tax statute for investigation of purely criminal matters nor in any other manner connected with the nature or conduct of the investigation here involved. As a result, Defendants' motions for suppression of evidence on Fourth Amendment grounds must also be denied.

The suppression motions of Defendants Stamp and Dienelt, based on Fourth, Fifth and Sixth Amendment grounds, must also be denied. Since no records or books belonging to either of them were inspected by the Government, the only theory on which their motions could be granted is on the basis of tainted evidence, that is, that evidence of their involvement came to light only as the result of the allegedly illegal search or unconstitutional interrogation of Defendants Leigh, Rogers, Reynolds and Freeman. The suppression motions of these four defendants having been denied, the motions of Defendants Stamp and Dienelt must also be denied on the basis of the earlier portions of this opinion.

CONCLUSION

In summary, this Court holds (1) that suspects in criminal cases arising out of tax investigations are entitled to be advised of their constitutional rights when the accusatory stage is reached and the adversary process begins to operate; (2) that neither physical custody nor the entrance of the special agent into the case marks the clear line between the investigatory and the accusatory stages; (3) that the accusatory stage is reached in the tax case only when the underlying evils which *Miranda* sought to combat arise, that is, when the defendants become the prime suspects of

specific crimes, when they are subjected to the psychologically coercive atmosphere of government interrogation or demands for financial records, or when their freedom of action is significantly infringed; and (4) that, while the use of a civil tax statute for a purely criminal investigation would be unconstitutional, the use of such a statute to inspect books and records for both civil purposes and possible criminal prosecution does not constitute that fraud and deceit which characterize a search and seizure as unconstitutional.

As a result of these findings, Defendants' motions to suppress must be denied on Fourth, Fifth and Sixth Amendment grounds.

/s/ AUBREY E. ROBINSON, JR.
Judge

September 5, 1968.

**2. District Court's Opinion Denying Defendants' Motion to
Dismiss the Indictment.
May 2, 1969. [300 F. Supp. 503-07]**

MEMORANDUM AND ORDER

AUBREY E. ROBINSON, JR., District Judge.

This is a Motion to Dismiss the Indictment based on Rule 6(f) of the Federal Rules of Criminal Procedure and the Fifth Amendment. Defendants allege that the indictment procedure was defective in this case because the Grand Jury foreman did not read the indictment before signing it under the traditional certification "A True Bill." This allegation was raised in open court on April 28, 1969, at what was originally scheduled to be a "*Gaither* hearing."¹ But, subsequent to the scheduling of said hearing,

¹ *Gaither v. United States*, No. 21,780, 413 F.2d 1061 (D.C. Cir., April 8, 1969).

the Court of Appeals issued its supplemental *Gaither* opinion,² rendering the points raised in Defendants' written motion papers moot. However, counsel being present in Court to address themselves to other matters pending in this case, the Court agreed to hear argument and testimony regarding the alleged non-*Gaither*³ defect in the indictment procedure.

Reviewing the lengthy history of this case, the Court concludes that defendants' April 28, 1969 Motion to Dismiss the Indictment was not timely under Rule 12 of the Federal Rules of Criminal Procedure and the local rules of this Court,⁴ and that by virtue of the provisions of Rule 12(b) (2) of the Federal Rules of Criminal Procedure, defendants have waived their right to raise the allegation that the indictment is defective because the foreman failed to read it. Rule 12(b) (2) provides in pertinent part:

Defenses and objections based on defects in the institution of the prosecution or in the indictment or information * * * may be raised only by motion before trial. *The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof*, but the court for cause shown may grant relief from the waiver. [Emphasis added.]

Thus, if a motion is made which is addressed to defects in the indictment it must include *all* defenses and objections falling within this class then available to defendants.⁵ Rule 12(b) (2) requires a *single* motion addressed

² *Gaither v. United States*, No. 21,780, 413 F.2d 1081, On Petitions for Rehearing (D.C.Cir., filed April 24, 1969).

³ *Gaither v. United States*, No. 21,780, 413 F.2d 1061 (D.C.Cir., April 8, 1969).

⁴ District Court Rule 87(d).

⁵ Fed.R.Crim.P. 12(b) (2). See also 1 C.A. Wright, Federal Practice and Procedure (Criminal) § 193 at 406 (1969).

to defects in the indictment; failure to raise all such defects in that one motion constitutes a waiver of the right to raise such objections.⁶ "Although the court for cause shown may grant relief from a waiver, this is done only rarely."⁷

The indictment in this case was returned on September 22, 1967. Pleas of not guilty were entered on October 6, 1967. Subsequently, an extensive series of very thorough pre-trial motions were filed by counsel, which in the opinion of the Court left virtually no procedural avenue unexplored.⁸ The Court more than once extended the time for filing these motions pursuant to Rule 12(b) (3) of the Federal Rules of Criminal Procedure. Finally, the motions were set for oral argument and the taking of testimony on June 4 and 5 and August 5, 1968. The motions were argued by five experienced retained trial attorneys and one experienced court-appointed attorney, and were ruled upon by the Court. One of the motions was captioned "Motion by Defendant, Walter R. Reynolds, to Dismiss Indictment for the Illegal Swearing of Grand Jury Witnesses to Secrecy," filed on November 29, 1967, subsequently joined in by *all* defendants, and argued and denied by the Court on August 5, 1968. Said motion was based on Rule 6(e) of the Federal Rules of Criminal Procedure and the Fifth Amendment, and clearly raised an objection "based on defects in the institution of the prosecution or in the indictment or information" within the meaning of Rule 12(b) (2). Defendants failed to allege in the August

⁶ Fed.R.Crim.P. 12(b) (2); Notes of Advisory Committee on Rules, Fed.R. Crim.P. 12(b), 18 U.S.C.A.

⁷ 1 C.A. Wright, *supra* note 5 at 406.

⁸ The pre-trial motions included motions to suppress based on the Fourth and Fifth Amendments, for discovery and inspection, for bill of particulars, to dismiss for want of speedy trial, to dismiss count one as duplicitous, to consolidate counts and dismiss, to sever defendants, to sever counts, to dismiss for illegal swearing of Grand Jurors, to inspect Grand Jury minutes, and to transfer trial of case.

5, 1968, motion to dismiss under Rule 6⁹ that the indictment procedure was defective because the Grand Jury foreman failed to read the indictment before signing. Instead, they seek to raise it by a second motion to dismiss under Rule 6 made one week prior to the scheduled commencement of the trial and some eighteen months after the indictment was returned. Under the express provisions of Rule 12(b) (2), they are precluded from raising this objection at this late time.¹⁰ Their failure to raise it in their first motion to dismiss for defects in the indictment procedure constitutes a waiver for all time of their right to present that objection to the Court.¹¹

“[T]he court for cause shown may grant relief from the waiver.”¹² However, in the circumstances of this case the Court does not find cause for granting such relief and allowing defendants to belatedly raise their new objection to the indictment procedure. The information, both factual and legal, on which the April 28, 1969, motion was based was at all time available to defendants and yet they failed to take appropriate action at the time they filed their first motion to dismiss.¹³ Looking to the facts first, there is no merit to the argument that defendants could not have discovered until recently the Grand Jury foreman's failure to sign the indictment. The foreman was available to be questioned by counsel long before the April 28, 1969, hearing; indeed, he was one of the prime witnesses at

⁹ Fed.R.Crim.P. 6.

¹⁰ *United States v. Campisi*, 306 F.2d 308, 312 (2d Cir.), cert. denied, 371 U.S. 925, 83 S.Ct. 293, 9 L.Ed.2d 233 (1962).

¹¹ Fed.R.Crim.P. 12(b) (2). See also *United States v. Campisi*, 306 F.2d 308, 312 (2d Cir.), cert. denied, 371 U.S. 925, 83 S.Ct. 293, 9 L.Ed.2d 233 (1962); 1 C.A. Wright, *supra* note 5. Cf., *United States v. Freeling*, 31 F.R.D. 540, 543 (S.D.N.Y. 1962).

¹² Fed.R.Crim.P. 12(b) (2).

¹³ *Scales v. United States*, 260 F.2d 21, 46 (4th Cir. 1958), affirmed, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961). See also 8 J.W. Moore, *Federal Practice* ¶12.03 [4] (Cipes ed. 1968).

the August 5, 1968 hearing on defendants' first motion to dismiss the indictment for defects in the Grand Jury proceedings. And if, as alleged, the supposed brevity of the Grand Jury deliberations on the day the indictment was returned led to the suspicion that the entire indictment could not have been read, this information was available on September 22, 1967, for counsel for defendant Reynolds has represented to the Court that he was outside the Grand Jury room during those allegedly abbreviated deliberations. Thus, the facts concerning the newly alleged defects in the Grand Jury proceedings were "notorious and available to [defendants] in the exercise of due diligence" long before April 28, 1969, one week prior to the scheduled commencement of trial.¹⁴ Turning to the law, defendants' delay in raising the present objection is not justified by the fact that the *Gaither* decision¹⁵ was not announced until April 8, 1969. Defendants have clearly indicated to the Court that their present objection is in no way based on *Gaither*,¹⁶ as indeed it could not be under the rule of the supplemental opinion in that case,¹⁷ nor on "new law" in any sense of the term, but on the more general and long-known mandates of Rule 6¹⁸ and the Fifth Amendment. Thus, the applicable legal principles were equally "notorious and available" to defendants.¹⁹

¹⁴ *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363, 83 S.Ct. 448, 9 L.Ed.2d 357 (1963).

¹⁵ *Gaither v. United States*, No. 21,780, 413 F.2d 1061 (D.C.Cir., April 8, 1969).

¹⁶ *Id.* It should be pointed out that, unlike the present case, the contentions raised in *Gaither* had been raised by timely motion to dismiss the indictment in the District Court. *Id.*, 413 F.2d at 1065.

¹⁷ *Gaither v. United States*, No. 21,780, 413 F.2d 1061, On Petitions for Rehearing (D.C.Cir., filed April 24, 1969).

¹⁸ Fed.R.Crim.P. 6.

¹⁹ *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363, 83 S.Ct. 448, 9 L.Ed.2d 357 (1963).

The Court need express no opinion on the substantive argument raised by defendants that the failure of the Grand Jury foreman to read the indictment before signing makes the indictment fatally defective. It is enough to say that the objection has been waived and that cause has not been shown for relief from that waiver.²⁰ Accordingly, it is this 2nd day of May, 1969,

Ordered that defendants' Motion to Dismiss the Indictment for Defects in the Grand Jury Proceeding be and is hereby denied.

²⁰ To the extent that the contentions raised here have any relationship to the two *Gaither* opinions, the Court of Appeals in *Gaither* made it clear that the type of objection made there must be raised by timely motion under Rule 12(b) of the Federal Rules of Criminal Procedure. Fed.R.Crim.P. 12(b). See *Gaither v. United States*, No. 21,780, 413 F.2d 1061 (D.C.Cir., April 8, 1969), at 1065 n. 2. Indeed, as noted *supra* note 16, the contentions made about the indictment procedure in *Gaither* had been raised by timely motion in the District Court. Finally, the Court indicated clearly that the timeliness requirements of both the federal and local rules should be applied in such a case, for in footnote 7 of its supplemental opinion, the Court said: "In our footnote 32 [of the original opinion], we stated: 'However, pre-trial challenges to the defect found here can be made in cases now pending trial.' This merely tracked the language of Rule 12(b) (2), which we had cited in footnote 2, and did not foreclose application of Rule 12(b) (3) (or its local correlate, District Court Rule 87(d)), which we had cited immediately after Rule 12(b) (2) in footnote 2." *Gaither v. United States*, No. 21,780, 413 F.2d 1081, On Petitions for Rehearing (D.C.Cir., filed April 24, 1969), at n. 7.

3. District Court's Opinion Denying Defendants' Motions for Post-Trial Relief.

December 24, 1969.

AUBREY E. ROBINSON, JR., District Judge.

Five Defendants in this case were indicted in September, 1967, and charged with conspiracy to forge and utter and to commit false pretenses in violation of Title 18, Section 371, United States Code, and Title 22, Sections 1301 and 1401 of the District of Columbia Code.¹ In addition, the five were charged with twelve (12) counts of false pretenses in violation of Section 1301 of the District of Columbia Code. On May 20, 1969, a jury found each of the five defendants guilty of each of the counts of the indictment.

In a series of post-trial motions, the defendants seek relief in the form of a new trial, a judgment of acquittal or an order arresting judgment. Generally, the grounds advanced for the relief are alleged Gaither² irregularities in the grand jury indictment process, deficiencies in the pronouncement by the jury of its verdict, and inadequacies in the evidence required for conviction which was developed by the Government. Since the first two grounds for relief are, in the opinion of the Court, without merit and hence unable to support the relief which the defendants seek, we deal solely with the evidentiary problem. Because a review of the testimony offered in this case leads to the conclusion that any irregularities which might have occurred in the proceedings were not of sufficient import and magnitude to justify the exercise of the Court's discretion in ordering a new trial, the evidentiary issues which are raised are treated in the context of the Motion for a Judg-

¹ A sixth defendant who was indicted for conspiracy to forge and utter and to commit false pretenses in violation of Title 18, Section 371 of the United States Code, and Title 22, Sections 1301 and 1401 of the District of Columbia Code was acquitted by the jury.

² Gaither v. United States, 413 F.2d 1061 (D.C.Cir. 1969).

ment of Acquittal under Rule 29(c) of the Federal Rules of Criminal Procedure. Under that Rule, a trial judge must "... determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty." *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir. 1947). See 8 *Moore's Federal Practice* ¶ 29.06 (2d ed. 1969). A. Goldstein, *The State and The Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1153 (1960).

Walter Reynolds was president and owner of the Reynolds Construction Company. The Company was involved in real estate development in the northern Virginia area during the early 1960's. The project out of which this indictment arose was the Potomac Hills development in the vicinity of McLean, Virginia. This development consisted of several hundred homes in the forty to fifty thousand dollar price range. As a result of this project, the Defendant Reynolds was heavily in debt to the Eastern Savings and Loan Company (hereinafter referred to as "Eastern"), which had advanced him construction funds, to his subcontractors and to his real estate salesmen.

For various reasons, Reynolds experienced considerable difficulty in selling these homes; and in order to keep his operation solvent, he found it necessary to refinance. Reynolds' credit position, however, made refinancing through conventional techniques unfeasible. Since a substantial number of houses had been completed, Reynolds sought to use them as security for additional capital which otherwise would not be forthcoming. Reynolds initiated a scheme to obtain the necessary capital by representing to Eastern that private purchasers for seventeen (17) of the houses had been located. He was assisted in the execution of this scheme by Defendants Rogers and Leigh, two attorneys, who were primarily responsible for drafting the necessary legal documents, by Defendant Stamp, a mortgage broker, who made the refinancing contacts with Eastern, and by Defendant Freeman, who was an employee of Reynolds, and whose part in the scheme consisted of producing or inventing straw parties whom Reynolds would then offer to Eastern as purported purchasers for the seventeen properties.

As part of this plan, the defendants submitted to Eastern for each of the seventeen properties a set of documents consisting of a sales contract, a loan application, a credit statement, a settlement statement, a deed of trust, and an application for membership in Eastern. Following the submission of these applications, Eastern furnished approximately six hundred and seven thousand dollars (\$607,000) in loan money. The defendants either obtained the signatures of actual straws on blank documents which were later filled in with false information or randomly selected the names of purported purchasers from the Harvard Alumni Directory. It is undisputed that none of the purported purchasers either authorized or consented to the contents of the loan application which was submitted in his name, that the documents submitted by the defendants were false, and that each of the defendants knew of the falsity of the documents.

The defendants were charged under Title 28, U.S.C. § 371 with conspiracy to violate §§ 1301 and 1401 of Title 22 of the District of Columbia Code, relating to forging and uttering and false pretenses, and with twelve substantive counts of false pretenses. Conviction for conspiracy to commit these substantive offenses requires the degree of criminal intent necessary for conviction of the substantive offenses themselves. *Ingram v. United States*, 360 U.S. 672, 678 (1959).

The offense of forgery under Title 22 § 1401 of the District of Columbia Code consists of the false making or material alteration, with specific intent to defraud, of any instrument in writing which if genuine might apparently be capable of effecting a fraud. *Milton v. United States*, 110 F.2d 556 (D.C. Cir. 1944), *United States v. Briggs*, 54 F. Supp. 731 (D.D.C. 1944). Uttering under the same section of the District of Columbia Code requires an alteration or falsification of a writing which is then passed or attempted to be passed to another while represented to be genuine, by one who knows that the writing was falsely made or altered and who entertains a specific intent to defraud. In addition, the writing must apparently be capable of effecting a fraud. *Karikas v. United States*, 296 F.2d 434 (D.C. Cir. 1961), *Easterday v. United States*, 292 F. 664 (D.C. Cir. 1923).

The elements of false pretenses are "... a false pretense or false representation by the defendant or someone acting for and instigated by him, knowledge by the defendant as to the falsity, reliance on the pretense or representation by the person defrauded, an intent to defraud and an actual finding." *Robinson v. United States*, 42 App. D.C. 186, 192 (1914), *Cuillo v. United States*, 325 F.2d 227 (D.C. Cir. 1963), 2 Wharton's Criminal Law 352."

One of the essentials of false pretenses is that the defrauded party have relied on the misrepresentations made to it in connection with the efforts to defraud. The de-

fendants vigorously contend that the Government failed to satisfy its burden of proof on this element.

The theory of the Government's case was that Eastern followed a general practice of relying on representations made in loan applications, and that from this general practice of reliance, a jury might infer that Eastern relied on the seventeen applications which the defendants submitted.

The Government was particular to restrict its direct examination of bank officials to the general practices which the bank followed after loan applications were received. The Government offered no evidence about the specific treatment of the seventeen applications in question. When the defendants attempted on cross-examination to enter this area, the Government successfully objected on the grounds that direct examination had been limited to Eastern's general practices. (Tr. 127-28.) Throughout the proceedings, the Government adhered to the position that, on the strength of evidence about the general practice of Eastern to require, accept and process loan applications, a jury would be fully justified in inferring that the applications which the defendants submitted were in fact relied on by Eastern as the basis for making loans.

The Government's evidence of reliance came primarily from two of Eastern's key officials: Thomas R. Harrison, the president, and Robert L. Stoy, the assistant secretary.

Harrison's direct testimony outlined the procedures which Eastern followed after loan applications were received, and the part which applications played in those procedures. His testimony was that after a loan application was received the information which had been submitted with the loan request was forwarded to an appraiser who would determine whether the value of the property justified making a loan in the amount of the request. If the appraiser determined that the valuation of the property justified the loan, his recommendation was forwarded to Eastern's loan committee which usually consisted of

two or three senior officers who would then recommend a loan to the executive committee. The executive committee would then approve the loan subject to the final approval of the Board of Directors. (Tr. 532-33.) He also testified that it was not generally Eastern's policy to verify the information which an application contained but that the application was filed in order that it might be referred to at some point during the period when a filed application was pending to determine whether any changes in an applicant's credit picture had occurred after submission and prior to the final decision on whether to grant the loan. (Tr. 558.)

Harrison testified that while it was not Eastern's policy to uniformly verify information in loan applications, verification was sometimes made. Whether or not the information was verified, he testified, depended on the extent of Eastern's prior contact with the agent who forwarded the applications. The general policy was not to verify the information on applications received from agents with whom Eastern had had prior dealings. (Tr. 553-54.)

Defendant Stamp, the mortgage broker who forwarded the applications which became the subjects of this indictment, was known to Eastern officials and had dealings with Eastern on several prior occasions. (Tr. 561.)

Finally, Harrison testified that had it been known that information and representations made on a loan application were false, the application would not have been considered and a loan would not have been made.

Robert L. Stoy, the assistant secretary and settlement officer of Eastern, offered essentially the same testimony as to the general practices which Eastern followed in evaluating loan applications. He testified that when applications were received they were submitted to independent appraisers who would examine the applications, appraise the property and then make recommendations to the bank's loan committee. (Tr. 120.)

The defendants offered evidence purporting to show that Eastern did not rely on the representations in the applications because the identities of the borrowers had no bearing on Eastern's decision to grant loans, but that loans were made solely on the basis of the assessed valuation of the property offered as security. They also sought to show that Eastern customarily charged builders a higher interest rate on construction loans than it charged purchasers on home loans. (Tr. 555.) As part of the terms of the transactions here, the interest rate which Eastern charged for the original construction loans was six percent (6%). Under the terms of the refinancing, the interest rate required of the straws was also six percent. The defendants contended that Eastern's failure to adjust the interest rate in accordance with its usual practice showed that not only did Eastern not rely on the representations made by the defendants, but that it knew all along that Reynolds and his associates and not the straws were the real parties in interest. The defendants offered as additional evidence of non-reliance Eastern's downward adjustment of the interest rate when refinanced property passed from the hands of the straws into the hands of bona-fide consumer purchasers.

When this evidence was submitted to the jury, it could conceivably have been unimpressed with the Government's evidence of reliance and concluded that, consistent with the defendants' explanation of the events, Eastern did not rely on the representations in the applications. But at this juncture, we must conclude that the jury resolved conflicts in the evidence in the Government's favor and, in accordance with Rule 29(c), limit our inquiry to whether or not there was evidence which afforded a rational footing for the verdict which the jury did render. *See Johnson v. United States*, 21,851 D.C. Cir. June 20, 1969; slip op. at 4.

The Government's evidence might well have satisfied a jury beyond a reasonable doubt that Eastern relied on the

false information in the applications. The Government's testimony afforded a basis for a conclusion that Eastern followed a general practice of reliance on the contents of loan applications. From this conclusion, a jury could have inferred that Eastern relied on the seventeen applications which the defendants submitted. The probative value of the testimony about Eastern's general practice was not vitiated by the Government's failure to prove the processing of the specific applications in question, particularly in light of Harrison's testimony that the applications would not have been accepted and loans would not have been made had Eastern known the applications were forged, and that verification of the contents tended not to be made when applications were received from agents such as Stamp with whom Eastern had had prior dealings. Moreover, a jury could well have concluded that because of the nature of the financial situation from which the defendants were seeking relief and because they prepared and submitted forged documents, that they acted with the specific intent to defraud necessary for conviction under the substantive false pretense counts as well as under the conspiracy count.

The character of the reliance necessary for conviction of false pretenses was outlined in *Partridge v. United States*, 39 App. D.C. 571, 581 (1913), where the Court said that "... it is not necessary to a conviction that the false pretenses alleged would have been the sole inducement by which the property in question is parted with, if it had a preponderating influence sufficient to turn the scale, although other considerations operated upon the mind of the party. And this is true even though the prosecutor [complainant] would not have surrendered the goods solely on the pretense alleged. To require that the belief should be the exclusive motive would exclude conviction in any case; for in no case is any motive exclusive."

In *Gilmore v. United States*, 273 F.2d 79, 82 (D.C. Cir. 1959), our Court of Appeals restated the *Partridge* "pre-

ponderating influence" test of reliance under § 1301. It said: "The law merely demands that this belief be a contributing influence sufficient to turn the scale, or to put it another way, that the alleged fraud would not have been accomplished but for the misrepresentations made." (Id. at 82.) See *Ciullo v. United States*, 325 F.2d 227, 229 (D.C. Cir. 1963). Under the *Partridge* test, the misrepresentation necessary for the conviction need not have been the only inducement for the defrauded party to act: it need only have been one factor.

Viewed in the posture of a Rule 29(c) motion, the evidence of reliance which the Government produced conformed to the *Partridge* and *Gilmore* standards. A jury could rationally have concluded that applications were a significant and integral part of the loan granting process and that Eastern was not in the habit of lending large sums of money without regard to the identity or to the personal credit history of loan applicants. The jury could have reached the conclusion that Eastern relied on the representations in the applications and at the same time believed the defendants' testimony that the assessed valuation of the property was of paramount concern to Eastern, because it was Eastern's principal recourse in case of default. Such conclusions would be consistent with evidence which the Government offered from which the jury could have inferred that while the assessed valuation of the security determined the amount of the loan, the representations in the applications played a different but nevertheless crucial function, namely, that of determining to whom the money would be loaned.

Accordingly, it is by the Court this 24th day of December, 1969,

ORDERED, that defendants' Motions in Arrest of Judgment, Motions for a New Trial, and Motions for a Judgment of Acquittal be and hereby are denied.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

No. 24,198

UNITED STATES OF AMERICA, APPELLEE

WALTER R. REYNOLDS, APPELLANT

No. 24,197

UNITED STATES OF AMERICA, APPELLEE

E. NEIL ROGERS, APPELLANT

No. 24,196

UNITED STATES OF AMERICA, APPELLEE

HARLAN E. FREEMAN, APPELLANT

No. 24,195

UNITED STATES OF AMERICA, APPELLEE

R. MARGUET STAMP, APPELLANT

Appeal from the United States District Court
for the District of Columbia

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Assistant Attorney General

Criminal Division

Department of Justice

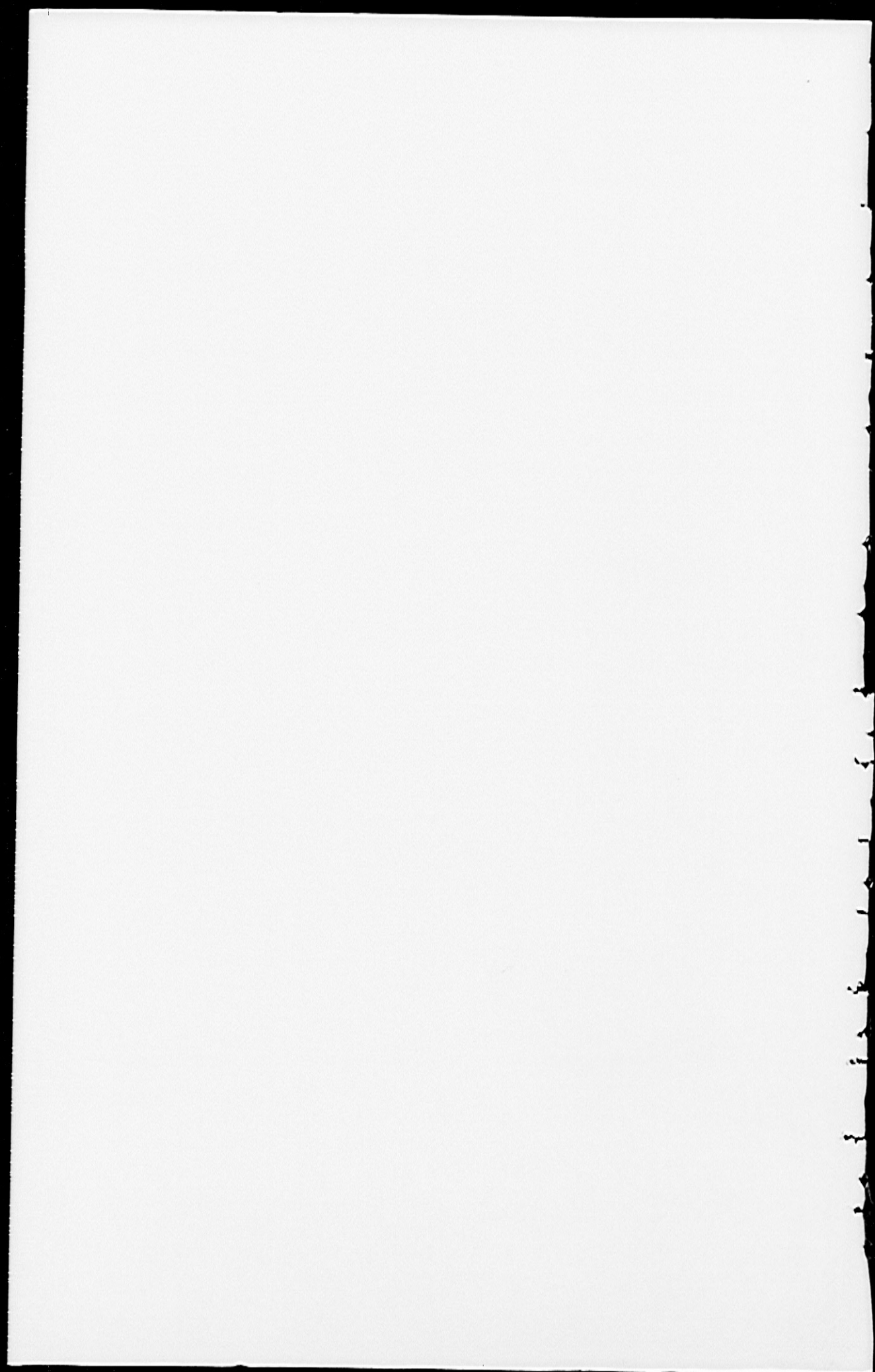
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III

ISSUES PRESENTED

*I. Whether the evidence was sufficient to show reliance on false loan documents (Reynolds Br. 26-32, Freeman Br. 49-57, Stamp Br. 20-23, Rogers Br. 27).¹

*II. (A). Whether the District Court abused its discretion by limiting the cross-examination of Government witnesses to the scope of the direct (Reynolds Br. 33-36, Stamp Br. 24-25, Rogers Br. 27. Listed as issue by Freeman but not argued).

(B). Whether the trial court erred in refusing to give a "missing witness" instruction (Stamp Br. 26-27, Freeman Br. 57-61, Rogers Br. 29).

(C). Whether the trial court erred in refusing a new trial on the basis of evidence available to the defense during the trial but not used (Freeman Br. 62-63, Rogers Br. 29).

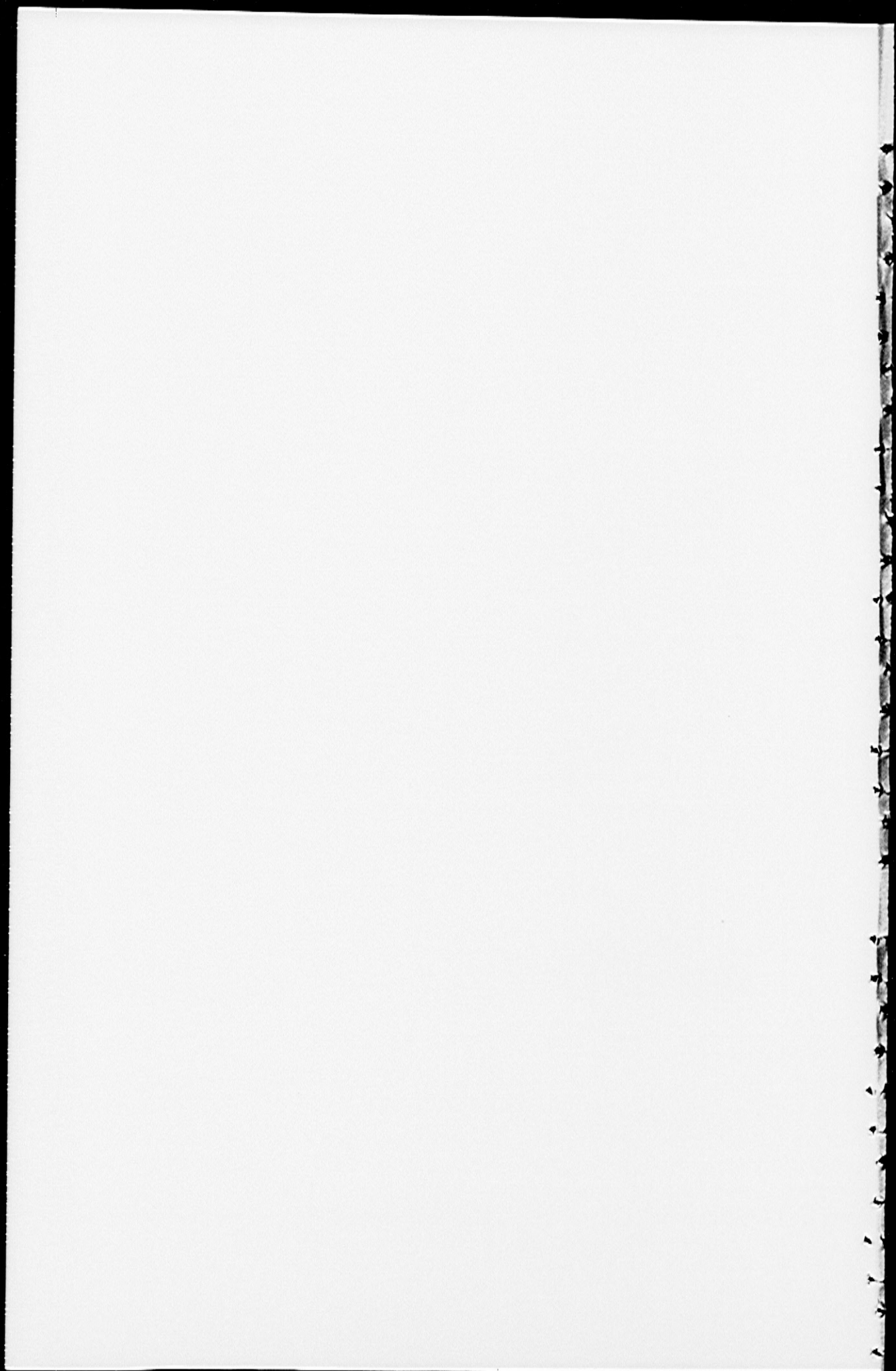
*III. Whether the District Court erred in denying motions to suppress evidence gained from civil tax audits (Reynolds Br. 20-25, Freeman Br. 30-40, Rogers Br. 18-26, Stamp Br. 24).

*IV. Whether the District Court erred in denying motions to dismiss the indictment for lack of timely prosecution where neither unnecessary delay nor substantial prejudice were shown (Stamp Br. 12-20, Rogers Br. 28).

*V. Whether the District Court erred in denying motions to dismiss the indictment for alleged jurisdictional defects (Reynolds Br. 11-20, Freeman Br. 40-49, Stamp Br. 20, Rogers Br. 24).[‡]

¹ For the convenience of the Court, we have set forth the pages of each brief where the issues are discussed. (*) signifies issues raised in one form or another by all appellants.

[‡] This case was previously before this Court under the name of *Reynolds, et al v. United States*, No. 23006, May 5, 1969, on petition for a writ in the nature of prohibition or mandamus on this issue. The petition was denied without opinion on that date.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,198

UNITED STATES OF AMERICA, APPELLEE

v.

WALTER R. REYNOLDS, APPELLANT

No. 24,197

UNITED STATES OF AMERICA, APPELLEE

v.

E. NEIL ROGERS, APPELLANT

No. 24,194

UNITED STATES OF AMERICA, APPELLEE

v.

HARLAN E. FREEMAN, APPELLANT

No. 24,193

UNITED STATES OF AMERICA, APPELLEE

v.

R. MARBURY STAMP, APPELLANT

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

(1)

COUNTERSTATEMENT OF THE CASE

Appellants were convicted on all counts of a thirteen-count indictment charging conspiracy (18 U.S.C. 371) to obtain money by false pretenses (22 D.C. Code 1401) and to commit forgery (22 D.C. Code 1301) in connection with the re-financing of loans on seventeen parcels of real estate (Count I) and substantive violations of 22 D.C. Code 1301 in the re-financing of twelve separate parcels (Counts II-XIII).

Appellant Reynolds was sentenced to imprisonment for a period of from twenty months to five years, but to serve six months with the balance suspended and two years probation on Count I. Imposition of sentence on Counts II through XIII was suspended and Reynolds was placed on two years probation, sentence on Counts II through XIII to be consecutive with execution of sentence on Count I. Appellants Stamp and Reynolds were given sentences identical to that of Reynolds except Stamp is to serve four months of his prison sentence and Rogers is to serve three months. Appellant Freeman is to be committed for a period of three months under the provisions of 18 U.S.C. 4208(b) before imposition of final sentence.

I

THE TRIAL EVIDENCE

A. The Evidence

Reynolds Construction Company had borrowed heavily from the Eastern Savings and Loan Association of Washington, D.C. to finance a housing project in McLean, Virginia. The company was unable to sell those houses and became insolvent (J.A. 109). Appellant Reynolds, in order to gain working capital, decided to borrow additional sums of money and contacted appellant Stamp, a mortgage loan broker, to obtain his services for this purpose.

Stamp and Reynolds had both had considerable business dealings with the Eastern Savings and Loan Association

(J.A. 116). It was decided that the money should be borrowed from Eastern using the houses contained in the McLean development as collateral (J.A. 114). Since, however, Eastern already had construction loans outstanding on these properties, it was determined to transfer them to "straw" parties (J.A. 116), who would borrow from Eastern under the guise of purchasing lots from Reynolds. Reynolds would retain the money borrowed and there would be a re-transfer of the property from the purported purchasers to the Reynolds Construction Company. In furtherance of this effort, defendant Dienelt² an accountant regularly retained by appellant Reynolds, and appellant Freeman, secretary of the Reynolds Construction Company (J.A. 113) attempted to secure the cooperation of persons to act as "straw" parties. Six persons agreed to do so. One of these persons was appellant Rogers (J.A. 116).³ Unable to find sufficient additional persons willing to get involved in these transactions appellant Freeman took twelve names from the 1960 Harvard Alumni Directory.⁴ Using these names, Freeman made up loan contracts and false credit statements (J.A. 117). Freeman turned these documents over to appellant Reynolds and was paid \$200.00 per name by Reynolds.

The loan documents obtained from the five persons who had agreed to act as straw purchasers were signed by them in blank (Tr. 213, 219, 276, 311-312, 315-316, 320). The information contained in these documents was inserted after the signatures were affixed. The credit information

² Acquitted by the jury.

³ Rogers did not ultimately serve as a straw purchaser.

⁴ Some of these persons testified at trial that they had no knowledge of these loans and that the documents were forgeries. It was stipulated that the remainder would testify, if called, that none of them knew Reynolds; agreed to buy any houses from him or signed any loan contracts; that the signatures on these documents were false; that they did not know R. Marbury Stamp, and had not authorized him to act as their agent; that they had not appeared at the offices of Leigh and Rogers for any settlements; and that their signatures and those of their wives on all of the documents involved in the loan transactions were false.

inserted for three of these loan applicants was totally false and grossly overstated their assets (Tr. 171-172, 281-285, 320-321). There was no clear evidence with respect to the financial status of one straw, and the information regarding the fifth "straw" was accurate. The documents relating to the seventeen loan transactions were submitted by appellant Stamp to Eastern Savings and Loan Association. Loans totalling \$607,000 were approved and the documents were sent to the law firm of Leigh and Rogers who were acting as settlement attorneys. It was necessary that the settlements be completed before the money could be disbursed (Tr. 124, 359, 367-368, 374, 376). The settlement documents were completed and the applicants' signatures notarized. None of the purported loan applicants went to the office of the settlement attorneys (Tr. 168-169, 175, 252, 259, 280-281, 312, 316). The notary seals were not affixed in the presence of the signators or at the time of the signatures (Tr. 176, 220-221, 259-260). None of the applicants received any of the loan proceeds (Tr. 170, 258, 281).

Harrison, the vice-president of Eastern at the time of the transactions, testified to the general loan policy of Eastern. He said that Eastern did not verify credit if submitted through an agent with whom it had been doing business (J.A. 101-102). The credit statement was considered in making the loan but the facts contained in it were not checked (J.A. 104). He affirmatively stated, "We would not make any loans based on false information." (J.A. 96). Defense counsel was not permitted to cross-examine Harrison as to whether he had examined the financial statements of Reynolds (J.A. 98). When defense counsel said that he wanted to show that Eastern knew that the transactions were straws and that Reynolds was able to pay the loans, the court indicated that defense counsel could call Harrison as a defense witness (J.A. 98-99). Harrison was in fact called by the defense as a character witness for Reynolds but was not questioned about these transactions.

Robert L. Stoy, Assistant Secretary of Eastern, was called by the Government to identify loan documents (Tr. 98-107). He was then excused subject to recall. Counsel for defendant Leigh⁵ indicated that he planned to call Stoy as a defense witness (Tr. 107), but Stoy was not called by the defense. He was, however, recalled by the Government. He was questioned with respect to whether the loan transactions in issue were made to designated persons (Tr. 117-120). He was then examined concerning the general practice of Eastern in making construction loans. He testified that, when a loan application is received, an independent appraisal of the property is made. The loan is then referred to an executive committee composed of the president and four members of the board of directors who approve or disapprove the loan (J.A. 82-83). No money is disbursed until the settlement papers are completed and a deed of trust note is executed. The money is disbursed to the settling attorney (J.A. 85). On cross-examination Stoy testified that he had approved the credit of the loan applicants on the basis of the credit statements accompanying the loan applications (J.A. 89-90). When Stoy was asked on cross-examination whether the loan committee examined the credit statement in determining whether to make loans the Government objected that this was outside the scope of the direct. The objection was overruled (J.A. 90). Stoy, who was not a member of the committee, said that he thought that loans were based on appraisal alone (J.A. 91).

Stoy further testified that Eastern's procedures with respect to Reynolds Construction Company were no different from those followed with any other borrower (J.A. 91).

On redirect Stoy affirmatively stated that Eastern would not make a loan on documents found to contain false information (J.A. 92). He also testified that to his knowledge Eastern had never permitted property on which

⁵ Leigh, a co-defendant who was convicted with appellants, has not appealed his conviction.

it had a loan outstanding to be in the name of a straw party (J.A. 93).

B. The Court's Ruling

In motions for judgment of acquittal and for a new trial, appellants argued that the Government had failed to prove reliance by Eastern on the false representations contained in the loan applications. Appellants attempted at this post-trial hearing to introduce on the issue of reliance "new" evidence which it was conceded had been available to counsel all during the course of the trial. The District Court, after reviewing the evidence adduced at trial, held that it was sufficient to support the verdict of the jury. (Opinion and order dated December 24, 1969, brief for appellant Reynolds Appendix pp. 28a-36a).

II

THE MOTION TO SUPPRESS

A. The Investigation

Before trial, appellants moved to suppress documents obtained from some of them during the investigation of the case. The facts adduced at the hearing showed that in the early 1960's federal and state authorities became aware of rumors of corruption and bribery in Fairfax County, Virginia (TSH 149, 150).⁶ An investigation known as the "Metro Project" was formed in the first part of 1963. It consisted of a task force of revenue and special agents of the Internal Revenue Service and received legal advice from the Department of Justice (TSH 137-138). The primary purpose of the "Metro Project" was to determine if there was any civil tax liability arising out of the alleged receipt of bribes and to determine if criminal charges should be lodged with respect to the

⁶ In accordance with the usage of appellants TSH refers to the testimony at the Suppression Hearing (Transcript of Pretrial Hearing, dated 6/4/68 & 6/5/68).

allegations of public misconduct (J.A. 48-49, TSH 49, 151, 163, 210). The investigation focused originally on A. Claiborne Leigh, former chairman of the Board of Supervisors of Fairfax County and former law partner of appellant Rogers (J.A. 46-47, TSH 139).

In June of 1963 Revenue Agent William Hansell, a member of the task force, was assigned by the director of the "Metro Project" to audit the tax return of A. Claiborne Leigh for the year 1960 (TSH 213). The audit began in September of 1963 (TSH 219). In December of that year Hansell became aware of possible irregularities and referred the case to the Intelligence Division (TSH 226). In January of 1964, Special Agent McElroy, a member of the task force, contacted Leigh and advised him at that meeting that there were indications of criminal tax evasion and that he did not have to testify or furnish information or documents (TSH 195-196, 217-218).⁷

After dissolution of the Leigh and Rogers law firm, some of the partnership files had been retained by appellant Rogers. On February 19, 1964 McElroy contacted Rogers regarding these partnership files (TSH 123-124). No request was made to see Rogers' personal records (TSH 127). Rogers was not under suspicion and was not advised of his constitutional rights (TSH 125-126).

Among the documents studied were certain settlement files relating to "straw" transactions involving the Reynolds Construction Company.⁸ In March of 1964 Revenue Agent Evangelist, also a member of the "Metro Project", began a civil tax audit of the Reynolds Construction Company. He subsequently audited the personal returns of Mr. and Mrs. Reynolds (J.A. 28-29, TSH 21). These audits continued periodically for about one year (TSH 26, 35). When McElroy learned that Evangelist was to

⁷ No statements of defendants were introduced by the Government at trial.

⁸ Reynolds Construction Company, of which appellant Reynolds was president, was a client of the Rogers and Leigh law firm.

do these audits, he asked him to obtain information relating to Leigh and the "straw" transactions (J.A. 41, TSH 210). McElroy also conferred with Rogers in October and November of 1964 concerning these transactions.

The information derived from these investigations revealed that the Reynolds Construction Company obtained loans from the Eastern Savings and Loan Association of Washington, D. C. These loans were in the form of "straw" transactions which were submitted to Eastern by the R. Marbury Stamp Company, a sole proprietorship belonging to appellant R. Marbury Stamp, a mortgage loan broker. One of the principal persons involved in obtaining "straw" parties was appellant Freeman, secretary of the Reynolds Construction Company. The loan settlements were handled by the law firm of Rogers and Leigh.

On July 6, 1964 agent Evangelist contacted appellant Freeman (TSH 202) and asked him to produce records for a civil tax audit (TSH 206). The books of appellant Stamp were also audited in 1964, but no information relevant to the subsequent indictment was obtained.

In April of 1965 revenue agent Shelton, another member of the task force, was assigned to do a civil tax audit of appellant Rogers' tax returns (J.A. 59). In September 1965 members of Project "Metro" began sending letters to persons whose names appeared as "straw" parties in the transactions being investigated (TSH 182). In December 1965 the first responses from the "straw" parties were received by the investigators. These responses indicated the probable criminal nature of the so-called "straw" transactions. At the subsequent contacts with appellants Freeman (February 11, 1966) and Rogers (March 22, 1966), Freeman was advised of his constitutional rights (TSH 212), and Rogers was advised that he did not have to provide any information. Rogers indicated that he understood that the investigation has become criminal in nature (TSH 266-269). There was no contact with Reynolds after the nature of the "straw" transactions was uncovered.

All the revenue agents testified at the hearing that they considered that they were doing civil tax audits and not conducting criminal investigations. (TSH 49, 227, 265-266, 129-130, 164).

B. The Ruling of the District Court

The District Court overruled the motion to suppress with an opinion printed in the Appendix to the Reynolds brief (opinion and order dated September 5, 1968, pp. 1a-22a). It pointed out that in so far as appellants Stamp and Freeman were concerned, no documents or statements were taken from them. With respect to the other appellants, the court held that *Miranda* warnings were required when the investigation reached the accusatory stage⁹ and that "the Internal Revenue Service advised defendants of their rights at the appropriate times under this test." Specifically in relation in appellants Rogers, Reynolds and Freeman, the court found that the Internal Revenue Service was conducting bona fide tax audits "with the additional purpose of determining whether their returns reflected any transactions with Leigh which might aid in its investigation of Leigh." It was only in December of 1965, after the government discovered that several of the "straw" parties had no knowledge of the transactions, that the government realized that appellants were involved in criminal activities. When Rogers and Freeman were contacted thereafter, they were given adequate warnings. Insofar as appellants contended that the very existence of the Metro Project indicated that the purpose of the investigation was criminal and that therefore the audits were not for civil purposes, the court found that an investigation under Section 7602 of the Internal Revenue Code may properly be undertaken if the government is "interested in both civil tax liability and criminal conduct, or solely in civil tax liability which later gave rise to evidence of crime."

⁹ The warnings specified in *Miranda v. Arizona*, 384 U.S. 436 (1966).

III

CLAIM OF DENIAL OF A SPEEDY TRIAL

At the time they moved to suppress evidence, appellants also moved to dismiss the indictment for lack of timely prosecution and the hearing on June 4 and 5, 1968 covered this issue as well. It was shown that in March of 1966 the last of the "straw" parties had been interviewed and the last affidavit obtained (TSH 184, 197-198). In April of 1966 a series of meetings was begun within the Metro Project for the purpose of collating and evaluating the information obtained from the investigation (TSH 136, 144). The case was not brought before the September, 1966 grand jury because it was felt that further investigation was desirable and time was needed to resolve questions as to the nature of the charges and venue (TSH 141-142, 144-148, 153-154).¹⁰

The next grand jury was convened in March of 1967. This grand jury began hearing evidence with respect to the case on April 28 of that year. The grand jury heard evidence with respect to the indictment on April 28, May 5, May 12 and June 23 of 1967. On September 22, 1967 it returned the indictment.

The district court denied the motion without opinion.

THE MOTION TO DISMISS THE INDICTMENT FOR
ALLEGED JURISDICTIONAL DEFECTS

A. The Facts Developed at the Hearing

Prior to trial, appellants moved to dismiss the indictment alleging that witnesses testifying before the grand jury had been sworn to secrecy in violation of Rule 6(e) Federal Rules of Criminal Procedure. That motion was denied after a hearing on August 5, 1968 at which the foreman of the grand jury testified. That ruling is not attacked on this appeal.

¹⁰ The time before this grand jury had been fully allocated in any event (TSH 141-142).

After the initial decision by this Court in *Gaither v. United States*, 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969), appellants on April 8, 1969, filed a motion to dismiss based on that decision. Prior to the hearing on that motion, this Court modified its previous opinion regarding grand jury procedures (*Gaither v. United States*, 134 U.S. App. D.C. 174, 413 F.2d 1081 (1969)). Appellants then argued that the indictment was defective because the foreman of the grand jury failed to read it before signing it. A hearing was held on these allegations on April 28, 1969.¹¹

The foreman of the grand jury was called and testified that on September 22, 1967 (when the indictment was returned), the Government prosecutor read the first part of the indictment to the grand jury, and summarized and explained the remainder (Tm. 16, 18, 20). The Government prosecutor represented to the court that he had read counts I and II in their entireties to the grand jury, and that he had explained the remaining counts of the indictment in such detail as to have virtually read them in full. He had summarized for the grand jury the evidence which it had heard and had explained the applicable statutes. He then told the grand jury that it was within their discretion whether or not to return the indictment. He gave a copy of the indictment to the grand jury and left the room (Tm. 7-9).

The indictment is twenty-one pages long and in thirteen counts. Count I is the conspiracy count and occupies nine pages. The remaining twelve counts each set forth one separate loan transaction, and each count occupies one page in the indictment. Counts III through XIII are identical to Count II except that different dates are involved and the amounts of the loans differ. This indictment was left with the grand jury. The foreman testified that he had not personally read the indictment and did not know if any other member of the grand jury had done so. The grand jury voted the indictment and the foreman signed

¹¹ Record references to this hearing are designated Tm.

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it as a "true bill." It was returned in open court at 10:15 a.m. on that date.

Counsel for appellant Reynolds implied that this procedure could not have been followed. He indicated that when he arrived outside the jury room at 10:18 p.m. he found that the grand jury was no longer there. On the assumption that the jury convened at 10:00, his position was that the procedure described by the foreman and government counsel could not have occurred.

B. The Court's Ruling

On May 2, 1969 the trial court entered its memorandum and order (300 F. Supp. 503, brief for appellant Reynolds Appendix pp. 22a-27a) denying the motion as untimely under Rule 12(b)(2) Federal Rules of Criminal Procedure. The trial court found as a fact that the alleged defects in the indictment were available to defendants in the exercise of due diligence at the time of the previous motion to dismiss the indictment. It ruled that defendants waived the objection by failure to make it in timely fashion.

The motion to dismiss on this count was reasserted after trial and was overruled (order and opinion of the District Court, dated December 24, 1969. Brief for appellant Reynolds, Appendix pp. 28a-36a).

ARGUMENT

I

The Evidence Supported the Verdict ¹²

Despite the fact that it is undisputed that defendants knew that the documents submitted to Eastern contained

¹² Arguments of appellant Freeman that the evidence did not support a finding of criminal intent on his part are totally without merit in view of the fact that he, a former Assistant United States Attorney, admitted under oath in court that he had supplied the fictitious credit statements and had forged all of the signatures on twelve of the loan documents for which he was paid the sum of \$2400.

forged signatures and false information,¹³ that in response to these applications, Eastern made loans totaling \$607,000; and that all the appellants knew that the money to be obtained from Eastern Savings and Loan Association was to go to Reynolds rather than to the putative borrowers, appellants claim that the evidence does not support the verdict. They argue that the evidence of Eastern's general practice does not support a finding of reliance by Eastern on the false and forged applications.

During the trial the Government called Robert L. Stoy, Assistant Secretary of Eastern Savings and Loan Association and Thomas R. Harrison, its president, as witnesses. Stoy testified that he had approved the credit of the purported borrowers on the basis of the credit statements contained in the applications for loans (J.A. 86-87, 89-90), that Eastern would not have made the loans if it had known that the statements were false (J.A. 92), and that to his knowledge Eastern never allowed property to stand in the name of straw parties (J.A. 93). He also testified that Reynolds was not treated any differently than any other borrower (J.A. 91), and that loans were made by Eastern solely on the basis of the papers submitted to it (J.A. 92).

Harrison testified that Eastern would not make loans on documents containing false information (J.A. 96), that the credit statement was referred to in making loans but was not verified (J.A. 104) where the applications were submitted through an agent with whom they regularly did business (J.A. 101), and that Eastern regularly did business with R. Marbury Stamp (Tr. 561).

Appellants' assertions that the sole determinant in making loans was the appraised value of the property is not supported by the record. The appraised value of the

¹³ Appellant Stamp apparently denies knowledge of the false and forged nature of the documents, but does not deny knowing that the loan transactions involved the obtaining of money from Eastern by submitting applications in the names of persons who were not in fact to receive the money and who were not to become the purchasers of the property involved.

property determined the maximum amount of any loan which might be granted, but the financial ability of the applicant to carry the loan was determined from the credit statement submitted with the loan application (Opinion and order of the District Court, dated December 24, 1969, page 13, brief for appellant Reynolds, Appendix p. 36a). Thus, even though appraised value was a substantial factor in granting the loans, the fraudulent credit statements and other false documents were material in securing these loans. See *Ciullo v. United States*, 117 U.S. App. D.C. 31, 325 F.2d 227 (1965); *Gilmore v. United States*, 106 U.S. App. D.C. 344, 273 F.2d 79 (1959); *Partridge v. United States*, 39 U.S. App. D.C. 511 (1913).

Moreover, the jury could properly infer that Eastern was, at the minimum, relying on the fact that the individuals who purportedly signed the application were the individuals who would have title to the land which was appraised.

In ~~totality~~ the evidence showed the following:

(1) Undisputed testimony including cross-examination of Freeman establishing that appellants acted together to submit false credit information and forged documents to Eastern, such documents being indispensable to the granting and disbursing of loans;

(2) The granting of loans totaling \$607,000 to persons who never received and who were never intended by appellants to receive money;

(3) The testimony of Stoy and Harrison showing that Eastern would not have made loans if they knew the documents contained false statements;

(4) The testimony of Stoy that he approved the credit of the purported purchasers; and

(5) The testimony of Harrison that credit information determined whether or not a loan would be granted to a particular applicant.

In light of the fact that defendants found it necessary to submit forged documents and that Eastern expended \$607,000 to the persons named in such documents, evi-

dence of Eastern's customary behavior was sufficient evidence for the jury to find that Eastern did rely on the fraudulent documents in making the loans in issue. In light of the established rule that in reviewing a criminal conviction, the appellate court must consider the evidence and all reasonable inferences derivable therefrom in the light most favorable to the government, the convictions must be sustained.

Since the Government had established its prima facie case through testimony as to Eastern's general practices, appellants' assertion that Eastern deviated from these practices in the instant case was an affirmative defense to be proved by the defendants. They never offered proof of that defense.¹⁴ As noted in the statement, when attempting to cross-examine Harrison about Reynolds' assets, the defense said they would show that Eastern relied on the credit of Reynolds. They did not do so when they had the chance.

II

Appellants Were Not Unduly Restricted In Cross-Examination and Were Not Entitled to a Missing Witness Instruction or to a New Trial on Newly Discovered Evidence

Closely related to their argument on the sufficiency of the evidence are various contentions by appellants relating to rulings which they claim prevented them from showing that Eastern did not rely on their false representations.

¹⁴ Appellant Reynolds' assertion that Eastern's failure to reduce the interest rate when the construction loans were converted into purchase loans shows that Eastern was aware of the nature of the transactions is without merit. It was not a common practice to reduce the interest rate to the purchaser (Tr. 547-549). A reduction of the interest rate to the purchaser was a bargained for transaction depending on availability of money, amount of downpayment, credit rating of the purchaser, and loan competition. It could only happen where the purchaser requested such a reduction (Tr. 549-551). In the instant case, since there were no real purchasers, there were no requests for reductions, and, accordingly, the interest rates on the loans were not reduced.

A. Cross-Examination of Stoy and Harrison

Examination of the record itself shows that appellants were not, as they claim (and as the trial court thought), restricted in their cross-examination of the bank officials as to the specific loans here in issue. Stoy was asked on cross if he had any knowledge that the 17 people existed. He responded that he personally did not; that he made no attempt to contact the people and was not required to do so (Tr. 127-128). He testified that the papers came from Stamp and the appraisals were by an independent firm (Tr. 128-130). He specifically was asked, "Was the procedure that you followed in these particular cases the same procedure?" and he answered, "To the best of my knowledge the same procedures [sic] followed in all loans by Eastern," (Tr. 131). As noted in the statement, Stoy said on cross-examination that loans by the committee were made on appraised value (J.A. 91). The question to Stoy which was successfully objected to related to loan repayments, this coming after Stoy said he was not familiar with *payments* on the loans made (Tr. 127-128).

As to Harrison, he was asked on direct about the specific loan to Rogers as illustrative of the general practice to which he testified (Tr. 537-540). On cross-examination he was asked what efforts were made to assure that loans were not made by false information. The limitation on cross-examination was not as to the loans, but as to the knowledge of the balance sheet of Mr. Reynolds (Tr. 541-547). This was clearly not part of the direct examination but an attempt, prematurely to put in an affirmative defense out of context—an affirmative defense which appellants never tried to prove when they had a chance.

In this complicated case with six defendants and one hundred-fifty exhibits, restricting the cross-examination to the scope of the direct cannot be said to have been an abuse of the trial judge's discretion.

Although appellants indicated that they intended to call Stoy as a witness for the defense they did not do so. Harrison was subsequently called by Reynolds as a char-

acter witness. Neither on cross-examination nor on their own direct examination did appellants ask or attempt to ask Harrison if Eastern knew the money was going to Reynolds or knew that the alleged purchasers were straws or non-existent. /

In short, appellants never in fact attempted to ask the questions they claim they were denied the right to ask. VIP

B. Missing Witness

The Trial Court Correctly Declined to Give the "Missing Witness" Instruction, Since the Instruction Was Inappropriate In This Case

It was established at trial that loans were approved by Eastern's loan committee, and that this committee made its decisions on the basis of the appraised value of the property and the approved credit statement of the loan applicant. }

In the instant case there were seventeen loan applications (all of which were accompanied by approved credit statements and appraisal reports) submitted to the loan committee over a period of several months. The government produced Stoy, whose initials were on the credit application, and Harrison, who was on the committee. There was no reason for the government to produce every member of the loan committee. While the total of these loans is \$607,000 the average loan was only about \$35,000. }

Since Eastern is in the business of lending money, there is no reason to think that the loan committee would have considered these loans as anything other than routine, or that the committee or any of its members would have had any specific recollections of these loans seven years after they were made except as reflected in the documents and the general practice as testified to by Stoy and Harrison. } MS

As noted above, the claim that Eastern did not rely at all on false and forged applications was an affirmative defense upon which the defense could have offered proof to counteract the government's *prima facie* case of reli-

ance. Its failure to do so does not show that the government failed to produce a witness under its control. As the Supreme Court said long ago in *Graves v. United States*, 150 U.S. 118, 120-121 (1893):

When pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he can offer evidence of the facts and circumstances as they existed and show, if such was the truth, that the suspicious circumstances can be accounted for consistent with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to support the charge.

In any event, in order for the missing witness instruction to be appropriate, the absent witness must be "peculiarly available" to the side against which the instruction is asked. *Stewart v. United States*, 135 U.S. App. D.C. 274, 418 F.2d 1110, 1114 (1969); *Wynn v. United States*, 130 U.S. App. D.C. 60, 397 F.2d 621, 625 (1967). There is no indication that these witnesses, assuming that they had relevant testimony to give, were not equally accessible to the defense.

C. New Evidence

Appellants attack as error the post-trial order of the District Court denying their motions for new trials based on asserted newly discovered evidence. The standard for determining the validity of such an attack has been laid down by this Court in *Thompson v. United States*, 99 U.S. App. D.C. 235, 236, 188 F.2d 652 at 653 (1951).

'The trial court has a broad discretion as to whether a new trial should be granted because of newly discovered evidence, and its actions will not be disturbed on appeal unless an abuse of that discretion appears.' To obtain a new trial because of newly discovered evidence (1) the evidence must have been discovered since the trial; (2) the party seeking the

new trial must show diligence in the attempt to produce the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal.¹⁵

So that the government
 The evidence which appellants assert justifies a new trial consists of certain documents that purport to show that Reynolds had paid the installments on three of the loans with one check, and that a certain bank officer had made collections of these loans at the Reynolds Construction site. Counsel for the government represented to the court that in repaying the loans Reynolds had acted in a surreptitious manner designed to disguise the source of the payments. Counsel for the government denied that the person alleged to have made collections at the construction site was a bank officer.

It was conceded by counsel for appellants that the so-called "new" evidence had in fact been available to the defense all during the course of the trial.

It is clear that the evidence was not new, was not used because it was lacking in probative value, and would not have affected the verdict if introduced. In any event, the defense cannot be permitted to "sand-bag" its evidence and then move after conviction for a new trial. *Shibley v. United States*, 237 F.2d 327, 332 (9th Cir. 1956), cert. denied, 352 U.S. 873, rehearing denied, 352 U.S. 919; *Saunders v. United States*, 91 U.S. App. D.C. 91, 197 F.2d 685 (1952); *Brandon v. United States*, 190 F.2d 175, 178 (9th Cir. 1951).

III

The Motion to Suppress Documentary Evidence Was Properly Denied

All appellants attack as error the order of the District Court denying their pre-trial motions to suppress evi-

¹⁵ See also *Bailey v. United States*, 132 U.S. App. D.C. 82, 405 F.2d 1352, 1358 (1968).

dence gained from audits of certain books and records conducted under authority of 26 U.S.C. 7602 (the order of the District Court is attached to the brief for appellant Reynolds). Appellants Rogers and Freeman urge Fourth, Fifth and Sixth Amendment violations with heavy reliance on *Miranda v. Arizona*, 384 U.S. 436 (1966). Appellant Reynolds concedes the inapplicability of *Miranda* since no incriminating statements of appellants were introduced by the government at trial. Reynolds, accordingly, relies on the Fourth Amendment. Appellant Stamp adopts the arguments of appellant Reynolds.

The government agrees that there is no *Miranda* issue in the instant case, not only because no incriminating statements were used at trial; but also because no such warnings were required, and even if constitutional warnings were required, the finding of the District Court that adequate and timely warnings were given is fully supported by the record. The warnings were adequate, although not given in the language of *Miranda*, because they fairly apprised the accused that the investigation had become criminal in nature.¹⁶ They were timely because given when the accusatory stage was reached.

Appellants do not assert that every civil tax audit must be preceded by constitutional warnings, nor do they as-

¹⁶ Appellants do not address themselves in detail to the adequacy of the warnings since they argue that these warnings were ineffective because given too late. Since the civil tax audits were not in custody interrogations and no incriminating statements were elicited, *Miranda* does not apply; and even if warnings were required under the circumstances, the language of *Miranda* would be inappropriate. A mechanical application of Fifth Amendment *Miranda* warnings to determine the voluntariness of consent to a search is unrealistic and unnecessary, see *Gorman v. United States*, 389 F.2d 158, 164 (1st Cir. 1967). The adequacy of the constitutional warning, if one was required, should be determined on the basis of whether or not the accused understood that the investigation had taken a criminal turn so that he could decide whether or not to withdraw consent to the search. This standard is certainly fair, where as in the instant case, all of the defendants were experienced businessmen and three of them were attorneys. In any event, appellants' complaints concerning the adequacy of these warnings is based on their assertions that they were deliberately deceptive.

sert that mere suspicion of possible criminal activities precludes a civil tax audit or requires warnings.¹⁷ Rather, they argue that the civil tax audits were conducted below as a disguised search for evidence of general crime and had no legitimate tax purposes. This assertion is not supported by the record.

The civil tax audits at issue were conducted by revenue agents of the Internal Revenue Service who were attached to a task force known as the "Metro Project." This task force was formed in 1963 to investigate the widespread rumors of corruption and bribery in Fairfax County, Virginia. The purpose of their investigations was two fold: (1) to determine if there had been bribes and if so, had there been a violation of 18 U.S.C. 1952, and (2) they wished to determine whether the taxes on such bribes had been paid. Since the project had a dual purpose, one of which was the assessment and collection of taxes, the use of civil tax audits was not precluded, and warnings were not required.¹⁸

The principal figure upon whom the investigation was focused was A. Claiborne Leigh, former Chairman of the

¹⁷ *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970); *United States v. Sequeri*, 398 F.2d 785 (2nd Cir. 1968); *Spinney v. United States*, 385 F.2d 908 (1st Cir. 1967); *cert. denied*, 390 U.S. 921; *Schlinsky v. United States*, 379 F.2d 735 (1st Cir. 1967), *cert. denied*, 389 U.S. 920; *United States v. Maius*, 378 F.2d 716 (6th Cir. 1967), *cert. denied*, 389 U.S. 905; *United States v. Mancuso*, 378 F.2d 612 (1967) modified, 387 F.2d 376 (4th Cir. 1967), *cert. denied*, 390 U.S. 955; *Selinger v. Bigler*, 377 F.2d 542 (9th Cir. 1967), *cert. denied*, 389 U.S. 904; *Morgan v. United States*, 377 F.2d 507 (1st Cir. 1967); *Rickey v. United States*, 360 F.2d 32 (9th Cir. 1966), *cert. denied*, 385 U.S. 835; *Kohatsu v. United States*, 351 F.2d 898 (9th Cir. 1966), *cert. denied*, 384 U.S. 1011; *United States v. Spomar*, 339 F.2d 941 (7th Cir. 1964), *cert. denied*, 380 U.S. 975; *United States v. Sclafani*, 265 F.2d 408 (2nd Cir. 1959), *cert. denied*, 360 U.S. 918; *Turner v. United States*, 222 F.2d 926 (4th Cir. 1956), *cert. denied*, 350 U.S. 913. See also *Kordel v. United States*, 397 U.S. 1 (1969).

¹⁸ *McGarry v. Riley*, 363 F.2d 421 (1st Cir. 1966), *cert. denied*, 385 U.S. 969; *Wild v. United States*, 362 F.2d 206 (9th Cir. 1966); *United States v. Sclafani*, *supra*; *Boren v. Tucker*, 229 F.2d 767 (9th Cir. 1957).

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Board of Supervisors of Fairfax County, Virginia. When the investigation was inaugurated, the government had no proof that Leigh had accepted any bribes or that there were any irregularities in his taxes. The inquiry was based on bare suspicion arising out of widespread but unsubstantiated rumors.

When revenue agent Hansell commenced his civil tax audit of Leigh's returns in September of 1963, he identified himself and asked to see records which Leigh was required to keep and which Hansell was entitled to inspect.

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paul?* In any civil tax audit evidence of criminal tax evasion may be uncovered and taxpayers are charged with this knowledge. In December of that year Hansell found the documents which had been marked as "straw transactions". Hansell, suspecting that these documents were evidence of tax irregularities, referred the matter to the Intelligence Division. Special agent McElroy thereupon called on Leigh and advised him that an investigation with respect to possible tax charges was in progress. Appellants assert that this warning was deliberately deceptive because the ultimate charges brought against Leigh were conspiracy, fraud and forgery. It is clear, however, that Leigh, an attorney, was informed that the investigation had now focused upon him with respect to suspected criminal activity. It is true that McElroy did not mention the suspicion of bribery, but this does not show a deliberate intent to deceive Leigh. The government had no proof that Leigh had accepted any bribes or had committed any federal criminal offenses. In any event, there would have been no point in working such a deception, since the documents at this time had already been examined, and there was no indication that Leigh was intending to object to the continuation of the civil tax audit. Moreover, appellants cannot rely upon an alleged violation of Leigh's rights.

In 1964, before the nature of the "straw transactions" was known, special agent McElroy called upon Leigh's former law partner, appellant Rogers. Rogers was advised that Leigh was under investigation, but that he,

Rogers, was not suspected. Appellants assert that this was a deliberate deception. It is clear, however, that McElroy's statement was truthful. Rogers was not under suspicion. The investigators at this point were interested in Leigh and the "straw" documents. All that they wished to examine were those partnership files which had been retained by Rogers after the Leigh and Rogers law firm had been dissolved. The personal records of Rogers were examined later, but no evidence was obtained from them.

The civil audit of Reynolds Construction Company was also conducted before the nature of the "straw" transactions was known. A corporation, of course, has no privilege against self-incrimination,¹⁹ but the Fourth Amendment does apply. It must be pointed out, however, that this audit was not a search for evidence against Reynolds. The interest of the investigators was to determine if Reynolds had made bribe payments to Leigh. This could have been evidence that Reynolds had violated 18 U.S.C. 1952, but the primary interest was not in the maker of the bribes, but in the tax liability of the acceptor. Thus, the subject of investigation was Leigh, and the records of the Reynolds Construction Company were examined with respect to Leigh's possible tax liability. Reynolds has no grounds to object to this audit since he was not the object of the investigation.²⁰

The only evidence challenged is the documentary evidence obtained from the records of the Leigh and Rogers law firm and the Reynolds Construction Company, and this is challenged on the allegation that it was obtained through fraud. No evidence was obtained from appellants Stamp and Freeman.

It is clear from the record, however, that the investigation was dual in purpose and that there was no fraud by the investigators. It is also clear that the true nature of the straw transactions was not established until Decem-

¹⁹ *Kordel v. United States*, 397 U.S. 1 (1969).

²⁰ The audit of Reynolds' personal records produced no evidence used at the trial.

ber of 1965 when the first affidavit revealed that at least one of the purported purchasers had not consented to the use of his name, had signed no documents, and was unaware of the loan transactions.

Whatever purpose the "Metro Project" had with respect to bribery, the particular transactions here at issue were not, up to that point, believed to be criminal in nature. The claim of fraud as to these appellants has no foundation in the record.

IV

The District Court Correctly Denied Appellants' Motions to Dismiss the Indictment for Lack of Timely Prosecution

2/18/66
Appellants do not complain of delay between indictment and trial. This delay was the result of motions filed by appellants. Rather appellants complain of the period of time which elapsed between the offenses charged and the return of the indictment.

The trial court, after lengthy hearings, found neither unnecessary delay nor substantial prejudice to appellants. These findings are fully supported by the record. The investigation leading to the indictment involved seventeen transactions which were entered into over a 16-month period and which involved six defendants. Although the "Metro Project" was formed in early 1963, the project investigators were not aware of the true nature of the so-called "straw" transactions until December of 1965 when the first affidavits from putative borrowers were received. The affidavits and interviews were not completed until March 1966. In April of that year, the task of collating and evaluating the information obtained from this three-year investigation was begun.

It was impossible to complete the investigation in time to seek an indictment from the grand jury in 1966. Even if the investigation had been completed, the time before that grand jury was completely allocated.

The next grand jury convened in March of 1967, and the following month the case was brought before it. There was no plan to delay in bringing it before the grand jury and there was no unnecessary delay in seeking the indictment. See *United States v. Orsinger*, 428 F.2d 1105 (D.C. Cir. 1970), *cert. denied*, Oct. 12, 1970, No. 442 this term, a case similar in complexity to the instant case. In that case this Court affirmed a conviction where the delay between the offenses and the indictment was five years. See also *Nickens v. United States*, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963).

In cases relied upon by appellant, the prejudice was related to the inability of witnesses to testify due to unnecessary delay. See *United States v. Parrott*, 248 F. Supp. 196 (D.C.C. 1965); *Ross v. United States*, 121 U.S. App. D.C. 233, 349 F.2d 210 (1965); *Petition of Provoo*, 17 F.R.D. 138 (D.C. Md. 1955) *affirmed* 340 U.S. 857.

Since there was in fact no unreasonable delay in this case, the question of prejudice is not really present.²¹

In any event there is no merit in the claim of appellant Stamp that his ability to defend himself was prejudiced by the destruction of files concerning the transactions in issue. He made no showing at the hearing of how such files would have exculpated his acts or contributed in any meaningful way to his defense. He now contends, for the first time on appeal, that the original loan application could have shown that the credit information was already filled in and signed when he received it from Reynolds. Stamp does not show how the loan application would have demonstrated when the credit information was inserted.²²

²¹ In *Hanrahan v. United States*, 121 U.S. App. D.C. 134, 348 F.2d 363 (1965), relied upon by appellants, this Court did not reverse where defendant showed prejudice through the inability of his witness to remember the events, but only remanded to determine if the delay was justified by the complexity of the case.

²² Appellant Rogers, who adopts the arguments of appellant Stamp, does not make even this limited and unconvincing showing of prejudice.

It was no part of the government's case at trial that Stamp personally supplied this false information. There was evidence at trial that Stamp suggested these illegal transactions and that he was a part of the conspiracy from its inception (Tr. 681-682). Moreover, it was established at trial that Freeman inserted the false credit information on at least twelve of the applications and that the other five applications were turned over to Reynolds by Dienelt and Freeman. Even if Stamp could have proven that Reynolds or some other person had inserted the false information, it would not have exculpated him.

The District Court Did Not Err In Denying Appellants' Pre-Trial and Post Trial Motions to Dismiss The Indictment for Alleged Jurisdictional Defects

Stripped of legal window dressing, appellants' arguments with respect to the ruling of the Court are reduced to the one factual contention that the indictment upon which appellants were tried and convicted was not the indictment of the grand jury.²³ This contention is contrary to the record.

The grand jury heard evidence with respect to the indictment on April 28, May 5, May 12 and June 23, of 1967. On September 22 of that year it convened at 9:15 a.m.²⁴ At that time the government prosecutor reviewed the evidence, explained the law and read the first two counts of the indictment in their entirety to the grand jury. He then summarized and explained the remaining counts of the indictment in such detail as to have virtually read them.

²³ Cases cited by appellants stand for the propositions that an indictment must charge an offense in language that properly puts the defendant on notice of what he must answer, that the indictment must be the grand jury's, and that a subsequent amendment of the charging portion of an indictment must be made by the grand jury.

²⁴ The government offered at the hearing and remains prepared to submit photostatic copies of the grand jury's minutes of September 22, 1967 showing that the grand jury convened at this time.

The indictment itself is twenty-one pages long. The first nine pages deal with Count I ~~the conspiracy count~~. This count was read in full. Count II is one page and deals with one loan transaction. This count was also read in full. Counts III through XIII are identical to Count II except that they relate to separate loan transactions. These counts were summarized and explained in detail.

It is clear from the record that the grand jury heard the evidence, knew the offenses charged and the language with which they were charged, had received an explanation of the law, and voted to return the indictment as a true bill. Accordingly, it is the indictment of the grand jury and the District Court had jurisdiction to try the case.

Since there was no jurisdictional defect, appellants' complaints regarding the indictment procedures are reduced at best to mere assertions of irregularities, and they make not the barest showing of prejudice arising from these procedures. In *Russell v. United States*, 369 U.S. 749 at page 763 (1962) the Supreme Court, quoting with approval from its opinion in *Smith v. United States*, 360 U.S. 1 (1959) said: "This Court has, in recent years, upheld many convictions in the face of questions concerning the sufficiency of the charging papers. Convictions are no longer reversed because of minor and technical deficiencies which do not prejudice the accused."

Whether or not the asserted irregularities were open and notorious at the time of the first hearing, it is clear that there was no jurisdictional defect, no prejudice to appellants and that the trial court did not err in refusing to dismiss the indictment.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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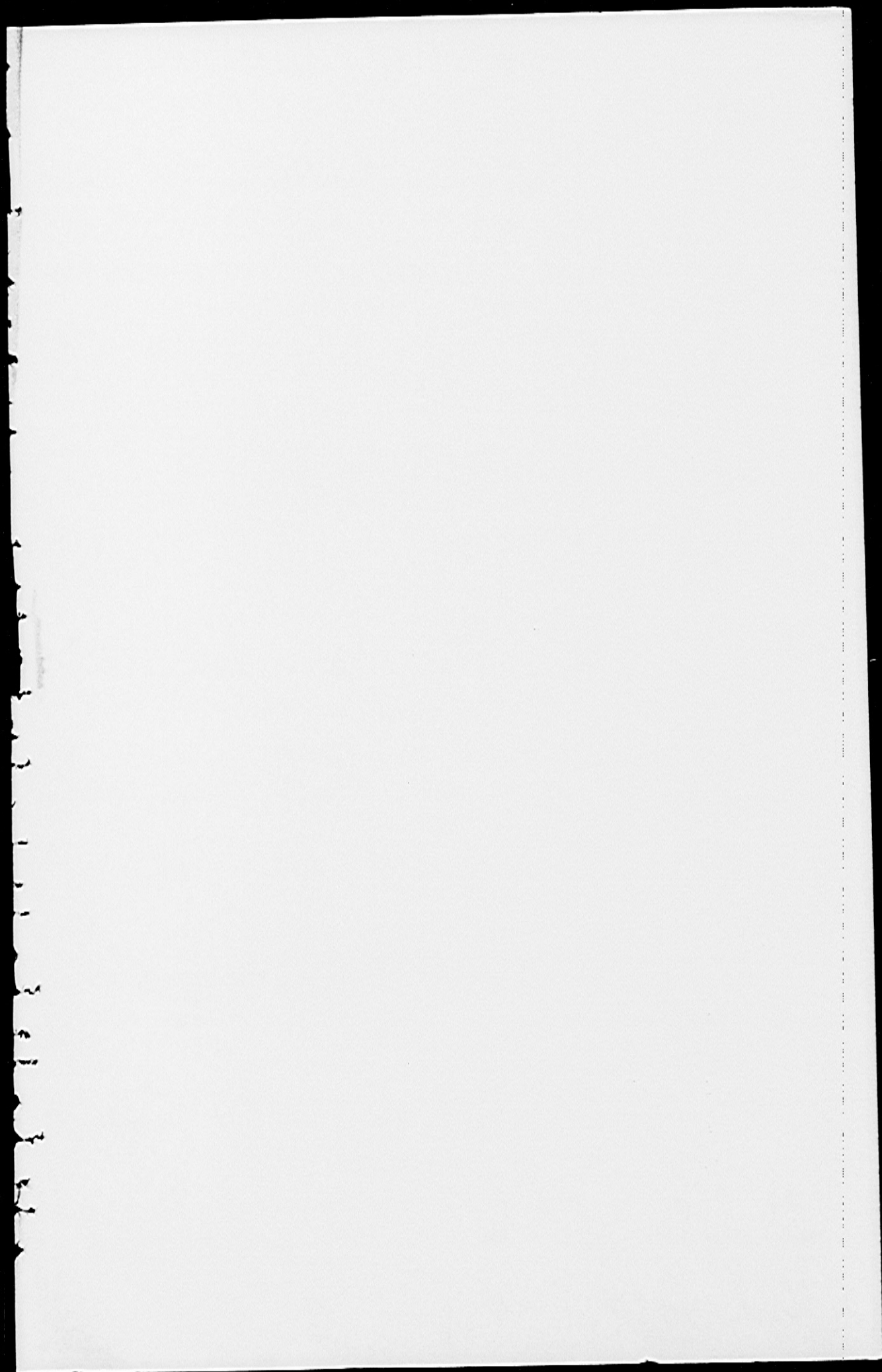
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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

Two copies of the foregoing brief for the United States, appellee, were mailed, first class, postage pre-paid, this 17th day of December, 1970, to J. Alan Galbraith, Esq., 1000 Hill Building, 839 17th St., N.W., Washington, D.C. 20006, counsel for Appellant Walter R. Reynolds; Lester M. Bridgman, Esq., 420 Executive Building, 1030 15th St. N.W., Washington, D.C. 20005, counsel for Appellant Harlan E. Freeman; Farley W. Warner, Esq., 2017 Que St. N.W., Washington, D.C. 20009, counsel for Appellant E. Neil Rogers; Stanley M. Dietz, 1029 Vermont Ave., N.W., Washington, D.C. 20005, counsel for Appellant R. Marbury Stamp.

/s/ Paul J. Schaeffer
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APPELLANT'S REPLY BRIEF

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,198

UNITED STATES OF AMERICA, *Appellee*

v.

WALTER R. REYNOLDS, *Appellant*

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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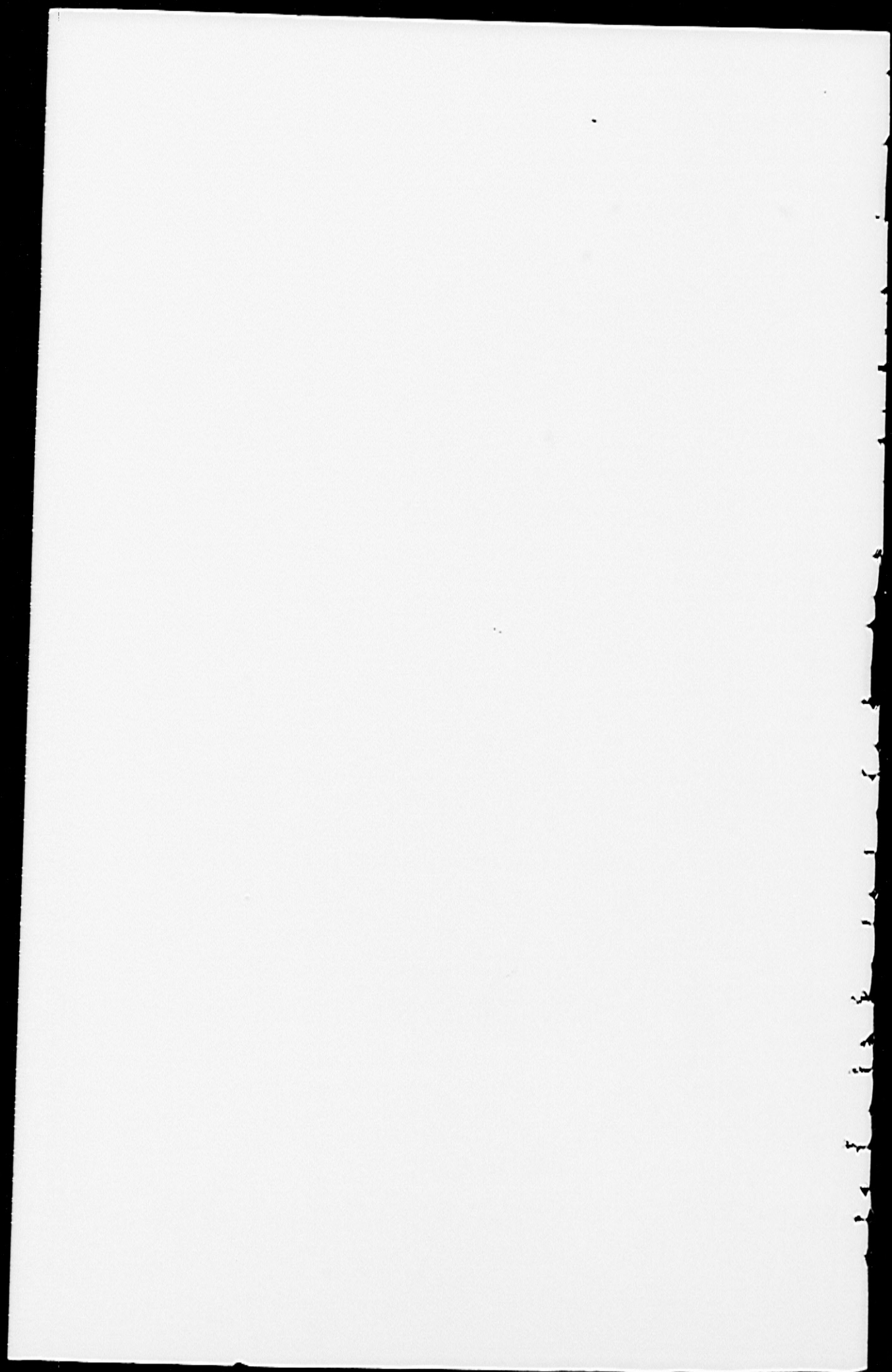


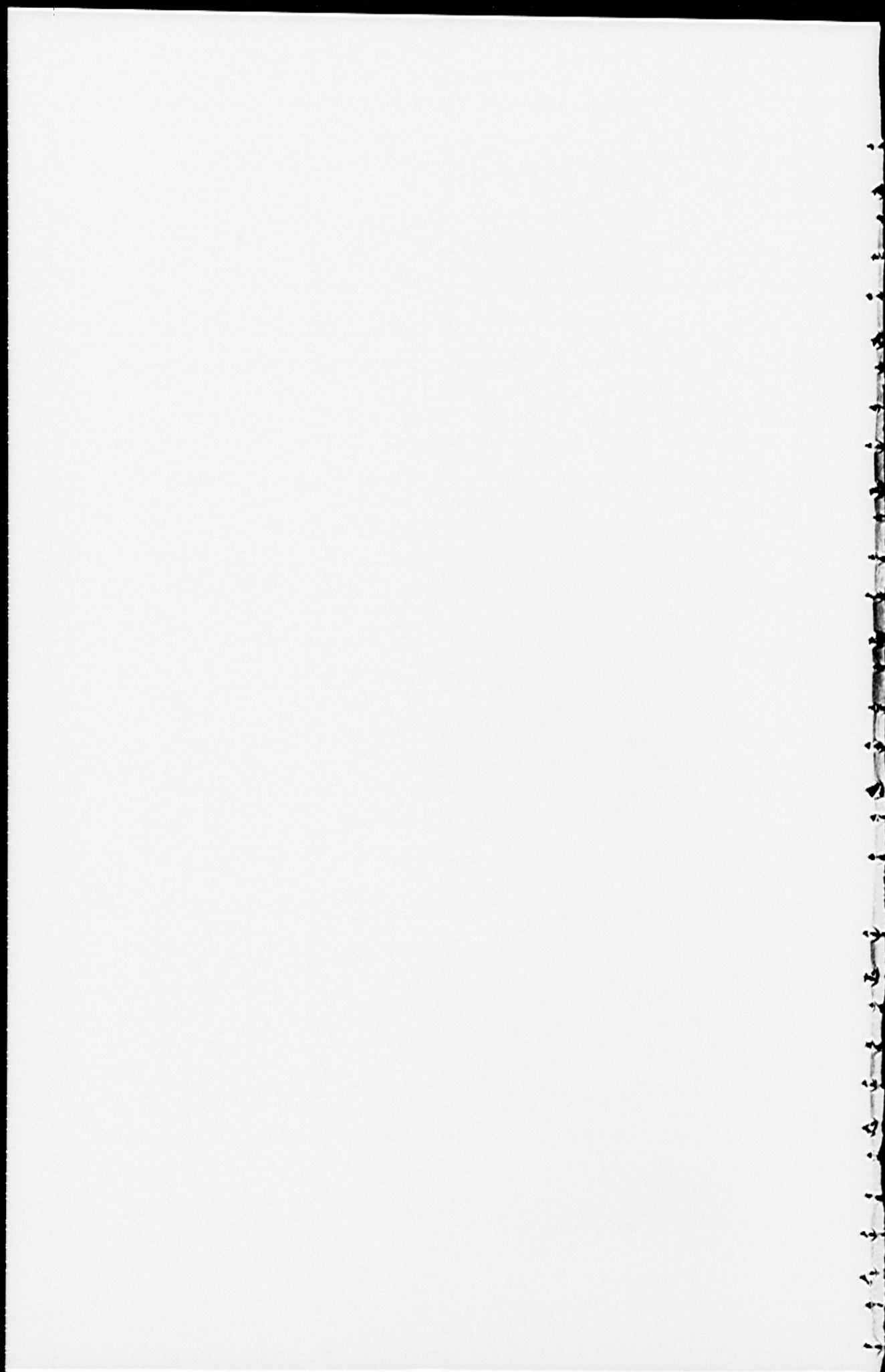
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IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,198

UNITED STATES OF AMERICA, *Appellee*

v.

WALTER R. REYNOLDS, *Appellant*

Appeal from the United States District Court
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APPELLANT'S REPLY BRIEF

**1. The Government Provides No Justification for the
Fundamental Defect in the Return of the Indictment**

The Government offers no defense in support of the trial court's ruling that the defect in the return of the indictment was sooner available and thus within the reach of Rule 12(b)(2), FED. R. CRIM. P. (Government's Brief, page 27).

Instead, the Government relies mainly on the prosecutor's representations that he acquainted the grand jury with the

allegations of the indictment. (Government's Brief, pages 11, 26) It argues that the defect complained of is a technicality.

The foreman, *who alone testified*, had no substantial recollection of the grand jury's deliberations or of the terms of the indictment; in the words of the prosecutor, the foreman's recollection was "vague." (J.A. 65) Yet, the indictment in this case has outstanding features: the complexity of the transactions, the length, the strained and awkward terminology. If its terms had been meticulously explained, the foreman should have had a more distinct recollection of that event. On his testimony the Government cannot fairly claim that the grand jury performed its role. It is also important to note that the trial court did not rule on the merits of defendants' motion but chose to reject it on a timeliness ground.

It is undisputed that the grand jury never passed on the actual terms of the indictment. During its deliberations the indictment remained in a closed manila envelope. (J.A. 67, 69) In the pre-*Gaither* practice the foreman had at least reviewed the actual indictment; in this case appellant Reynolds was denied this minimal protection. No member of his grand jury ever saw the bill of indictment.

Unlike *Gaither*, in which the indictment charged simple larceny in a short paragraph of forty-five words (see *Gaither*, 134 U.S.App.D.C. at 167, 413 F.2d at 1064), the indictment that initiated this prosecution charges involved financial transactions. It uses technical language. It is long. It is indefensibly drafted. (See Brief for Appellant Reynolds, page 18) It is improbable that an intelligent person would appreciate what was charged from another person's reading or explanation of its allegations. For an understanding this indictment requires study. And it is admitted that the grand jury did not undertake to study it. Thus, if the prosecutor acted as he represented, it is still

unfair to assume that any member of the grand jury understood the bill the grand jury was asked to return.

Appellant Reynolds' complaint against the grand jury proceedings, therefore, is more than "mere assertions of irregularities." (Government's Brief, page 27) The grand jury as a whole, *including the foreman*, did not pass on the terms of the bill. The purported indictment is not the indictment of a grand jury.

2. The Government Has No Defense for the Lawless Search Conducted by Its Own Agents

The Government admits but minimizes the stark reality that the "Metro Project" was organized for the purpose of ferreting out evidence of crime by means of tax investigations. The Government claims a duality of purpose: to find evidence of crime and to locate additional revenues. (*E.g.*, Government's Brief, page 21) To impress its contention upon this Court, the Government employs at every opportunity the rubric—"civil tax audit." This is a camouflage.

When revenue agent Evangelist undertook to examine the books and records of RCC, he had received his instructions from Director Cole, a special agent. (J.A. 38-39) He had received further instructions from special agent McElroy. (J.A. 41) Evangelist appreciated that he was to search for evidence of criminal conduct. (J.A. 39, 41) He obtained permission to inspect RCC's books and records but concealed his role as a criminal investigator. (J.A. 39) This is deliberate concealment of a material fact, commonly known as fraud.

The Government argues, however, that whenever it proceeds under the guise of a tax investigation, it necessarily demonstrates an interest in undisclosed civil tax liability. Because the evidence so obtained might lead to new federal revenues, the Government argues, the evidence is also admissible in any criminal proceeding. This omnipresent civil purpose, the Government concludes, prohibits any conten-

tion of a Fourth Amendment invasion. In support of this sweeping doctrine the Government relies on four cases. (Government's Brief, page 21, footnote 18) They are not on point.

In three of them the IRS proceeded pursuant to an administrative summons under 26 U.S.C. § 7602. In each of them the taxpayer resisted the summons, requiring the IRS to obtain judicial enforcement. In each case the IRS made a substantial showing of a legitimate civil tax reason for the issuance of the summons. As long as the IRS has made this showing, it is entitled to enforcement, although the information which it obtains may thereafter be used to impose criminal liability. *McGarry v. Riley*, 363 F.2d 421 (1st Cir.), *cert. denied* 385 U.S. 969 (1966); *Wild v. United States*, 362 F.2d 206 (9th Cir. 1966); *Boren v. Tucker*, 239 F.2d 767 (9th Cir. 1957).

The "Metro Project" investigators declined to proceed by administrative summons. They were unprepared to risk a judicial test of their civil tax need.¹ They were unwilling to accept judicial restraints on the scope of their activity. They chose the path of subterfuge. The Government has no basis, therefore, for citing authoritatively cases which sustain the IRS when it has abided by the statutory procedure provided by the Congress.

In the fourth case, *United States v. Sclafani*, 265 F.2d 408 (2d Cir.), *cert. denied* 360 U.S. 918 (1959), the revenue agent obtained the taxpayer's consent upon his truthful representation that he was engaged in a routine civil tax audit. As

¹ It is doubtful that the "Metro Project" investigators, if they had proceeded by administrative summons, could have made a showing of legitimate civil tax need. Agent Evangelist testified that he had no reason to suppose there was any irregularity in the returns of RCC or appellant Reynolds at the time he commenced his audit of their books and records. (J.A. 45) In *Donaldson v. United States*, 39 U.S.L.W. 4139, 4144 (Jan. 26, 1971) the Supreme Court reiterated, citing *Boren v. Tucker* and other cases, that enforcement of a summons may be denied when a criminal charge has been preferred or when there is "an investigation solely for criminal purposes."

a result of disclosures occurring during his audit a special agent later entered the case. The taxpayer was not informed of the changed nature of the investigation. Insofar as Fourth Amendment protections are concerned, it is settled that the altered course of the investigation does not retrospectively vitiate the taxpayer's consent. The premise of *Sclafani*, valid consent in response to a truthful representation, is not present in this case.

The Government questions, *for the first time in this litigation*, the standing of appellant Reynolds to raise the legality of the search of RCC's books and records. (Government's Brief, page 23) The Government is too late.

Firstly, by not raising the standing issue at trial, appellant Reynolds was denied an opportunity to show that he had a direct property interest in the premises illegally searched by agent Evangelist. See, *e.g.*, *Mancusi v. DeForte*, 392 U.S. 364, 367-70 (1968) (containing a collection of authorities). Reynolds and his wife owned a fifty percent interest in RCC, a closely held corporation.² (J.A. 109) Reynolds might have shown, for example, that RCC was in fact dominated by him. *Henzel v. United States*, 296 F.2d 650, 653 (5th Cir. 1961) is closely on point. The *Henzel* court found that the sole shareholder was "an aggrieved person" under Rule 41(e), FED. R. CRIM. P., and had standing to raise the illegal search of the premises of his unindicted corporation. Reynolds was one of just three shareholders and would thus have standing under the rationale of the *Henzel* rule.

Secondly, by not raising the standing issue at trial, appellant Reynolds was denied an opportunity to prove that the records shown agent Evangelist were obtained from an area "in which there was a reasonable expectation of freedom from governmental intrusion." *Mancusi, supra*, 392 U.S. at 368. He might have shown, for example, that

² One Albert Shaw owned a fifty percent interest in RCC.

the records, or some of them, came from his private office or from office space shared with other corporate officers of RCC. Under *Mancusi* such a showing would also satisfy the standing requirement.

Thirdly, if the Government had raised the standing issue before or during the suppression hearing, it would have given RCC, operated by appellant Reynolds, an opportunity to suppress the information gleaned from its books and records. RCC could have brought a civil action to enjoin the use of the records or leads obtained therefrom in any criminal proceeding initiated by the Government. *Goodman v. United States*, 285 F. Supp. 245, 252-53 (C.D. Cal. 1968). In *Goodman* the decree restrained federal tax officials and others from making any use of the illegally obtained evidence.

In *Smith v. Katzenbach*, 122 U.S.App.D.C. 113, 351 F.2d 810 (1965), this Court acknowledged that federal courts have broad equity power, not confined to the particular situations encompassed by Rule 41, FED. R. CRIM. P., to grant effective relief against governmental illegality. If the Government had raised the standing issue below, the trial court could have noted that the evidence sought to be suppressed emanated from an illegal search, thus eliminating the formal need for RCC (which was not indicted) to pursue an injunctive remedy that would have suppressed the evidence in this proceeding. A federal court's equity power extends, surely, to a prohibition against the use in its own courtroom of the illegally seized evidence.

Finally, the Government concedes that the information obtained from the files of RCC played a significant role in the preparation of its case. (Government's Brief, pages 7-8) A remand limited to the question of taint, as was alternatively suggested at page 25, Brief for Appellant Reynolds, is not required; if this Court accepts the Fourth Amendment argument of appellant Reynolds, it should reverse the judgment against him.

3. The Government Erroneously Contends That an Inference of Reliance May Be Validly Drawn Merely From Evidence of the Bank's General Practice

In the Government's view evidence of the bank's general commercial practice is sufficient to provide an inference that the bank followed its customary practice in the seventeen transactions at issue.³ Under the Government's theory defendants were required to rebut this inference as an affirmative defense. The Government emphasizes that defendants did not prove this affirmative defense when they had the opportunity.

In support of this doctrine the Government relies on the general proposition that it is entitled to all reasonable inferences to sustain a jury's verdict. In this manner the Government dismisses appellant Reynolds' contention that evidence of general practice, unaccompanied by other proof, is not competent to prove the essential element of reliance by the bank in the seventeen transactions.

The Government is *not* entitled to any inference that might be drawn from evidence of general practice unless it first establishes through the testimony of its witness that

³ On page 14 of its brief the Government "totals up" the trial evidence in five short sentences. It offers no record references. These sentences bear but a marginal relationship to the trial proof. The trial evidence is set forth in the Brief for Appellant Reynolds, pages 6-11. The Government has not challenged either the accuracy or the completeness of the facts which are there set forth. There are also important misstatements and oversights in the Government's summary of the trial evidence. Government's Brief, pages 2-6. The Government claims, for example, that RCC had become insolvent and for that reason was the motivating force behind the straw transactions. While RCC did sustain a substantial loss in 1962 (J.A. 109), there is no evidence that RCC was insolvent. There is also no evidence that defendants engaged in the straw transactions to rescue RCC. In its recital of the purported conspiracy the Government overlooks the significant point that monies obtained from the bank through the straw transactions were mainly used to pay off outstanding construction loans owed to the bank. From the bank's perspective one form of indebtedness (construction loans) was replaced by another form of indebtedness (mortgage loans). Admittedly, the new indebtedness exceeded somewhat the prior indebtedness but the bank also received secured protection through first deeds of trust on the improved properties. On the basis of its own appraisals the bank knew that the deeds of trust were in an amount substantially less than the fair market value of the improved lots. See Brief for Appellant Reynolds, pages 6-11.

he was in a position to observe the event, that he has no recollection of the event, and that if something unusual occurred he was in a position to notice it. Unless these foundation questions are affirmatively answered, there is no testimonial basis for admitting into evidence the general practice for the purpose of inferring that the general practice was followed at the time of the event at issue. See Brief for Appellant Reynolds, pages 28-29. These are the questions which the prosecutor, for some reason, refused to ask (or have asked) of Stoy and Harrison.

Defense counsel realized that the Government was not entitled to an inference and that its proof was therefore deficient on the issue of reliance. It is the Government's burden to offer at least some evidence on each essential issue. The Government's theory of "affirmative defense" (Government's Brief, page 16) is, in the circumstances of this case, just a device for shifting onto defendants the burden of proving a key element for the Government. In their own case, however, defense counsel are not obliged to supply, or to plan a defense that might inadvertently supply, the missing element in the Government's proof.

On the issue of reliance the Government offered no competent proof, let alone proof beyond a reasonable doubt, and the evidence is thus insufficient to support the judgment.⁴

⁴ In footnote 14, page 15, the Government contests the accuracy of an observation made by appellant Reynolds: "Appellant Reynolds' assertion that Eastern's failure to reduce the interest rate when the construction loans were converted into purchase loans shows that Eastern was aware of the nature of the transactions is without merit." The Government argues that the reduction could not have occurred because there were no real purchasers. If the Government had not mischaracterized the observation, it might have perceived its force. As was pointed out, one of the straws, Chesley, sold the property in his name to one Payne. (Chesley was not personally involved; he had been "invented" by Freeman. T. 458) Payne was a *bona fide* purchaser. In accordance with its then prevailing practice the bank financed his home at the consumer rate of 5¼%. For Chesley, the straw, the bank had charged 6%, the customary charge on construction loans. The reduction in the Payne transaction is circumstantial evidence that the bank knew that Chesley and other straws were not the real parties in interest: the bank did not give them the benefit of the lower consumer loan rate but it charged them at the 6% rate it had theretofore charged RCC. See Brief for Appellant Reynolds, page 30, footnote 20.

4. The Government Fails To Meet the Argument That Appellant Reynolds Was Denied a Meaningful Opportunity To Cross-Examine the Bank Officials

At trial the Government persuaded the trial court to limit the cross-examination of the bank officials, Stoy and Harrison, to the general commercial practice of the bank in passing upon applications for mortgage loans. The Government now makes the truly remarkable assertion that an inspection of the trial record shows no abridgment of the right of cross-examination. The Government concedes, parenthetically, that the trial court "thought" it was sustaining the Government's apparent trial position. (Government's Brief, page 16)

The Government thus asks this Court to believe that the trial court was merely engaging in fanciful and theoretical discussion when it wrote in its post-trial opinion that the Government limited its case to evidence of the bank's general practice, that the Government offered no evidence of the bank's specific treatment of the seventeen transactions, and that the Government blocked defendants from entering this area on cross-examination. (App. 32)

In support of this *tour de force* the Government extracts from the record a couple of examples in which defense counsel sought to cross-examine not only outside the seventeen transactions at issue but also outside that part of the general practice put into evidence by the prosecutor. (See Government's Brief, page 16) They were rebuffed. Defense counsel did not attempt to cross-examine Stoy and, perhaps more importantly, Harrison on the bank's handling of the seventeen transactions. In light of the trial court's expressed attitude ("*I will not permit it*" (J.A. 100)), formulated at the insistence of the prosecutor, defense counsel were not obliged to put the questions, knowing that objections would be sustained, and also incurring the wrath of the trial court in front of the jury.

Instead of presenting a substantive answer to appellant Reynolds' contention, the Government argues that defend-

ants could have called the bank officials in their case and examined them at that time on the seventeen transactions. If the Government's position were sustainable, no defendant in this type of case would be able to structure his own defense. The Government could do it for him. The Government proves the general practice through its witness; it relies on the (unfounded) inference. To rebut the inference defense counsel calls the Government's witness, thereby augmenting his credibility. Defense counsel risks an unfavorable answer in his own case; if the answer is unfavorable, his case is demolished before the jury. It is a wonderful scenario for the Government; it is not consistent with an adversary system of justice.

Furthermore, it is elementary that meaningful cross-examination follows upon direct. The witness is not permitted to reflect upon his prior answers for hours or days, enabling him to rationalize his position, and thus more effectively to meet his cross-examiner. It is peculiar, moreover, that the prosecutor was unwilling to have his own witnesses confronted on the transactions at issue. Apparently, the prosecutor was fearful that cross-examination on the bank's handling of the seventeen transactions would show that the bank knew that RCC was the real party in interest, so that it knew about or did not care about the false loan documents, or the Government was fearful that cross-examination would disclose the names of the bank officials directly involved, who would then be subpoenaed to testify in the defense case.

It is highly improbable, for example, that the bank relied on the false loan documents, not only because it relied solely on independent appraisals, but also because some of the credit statements are obviously contrived. Gurfein, a "Freeman" straw, listed \$973,000 in assets with no liabilities (Ex. 3M); Schaatsneider, a "Freeman" straw, listed \$558,000 in assets and \$2500 in liabilities (Ex. 3J); Lyons, another "Freeman" straw, listed \$280,000 in assets with

\$2550 in liabilities (Ex. 3I).⁵ Cross-examination of the bank officials might have exposed the incongruity that persons of such wealth would borrow from a bank to finance new homes. Also, it is surprising that persons of such wealth would have so little in liabilities.

Furthermore, a Government representative presumably interviewed one or more of the bank officials who understood the true nature of the transactions. There is no other explanation for the prosecutor's trial argument, rightly rejected by the trial court, that knowledge on the part of any officer of the falsities in the loan documents did not prevent defendants from defrauding the bank. (J.A. 110-11, 115)

In any event the prosecutor did block meaningful cross-examination directed at the transactions charged in the indictment. It is unfortunate that the Government denies in this Court the exercise of the ground rule it persuaded the trial court to adopt. The Government might have attempted to defend its trial tactic or, as there is no defense, might have gracefully conceded error. For the reasons explained in the Brief for Appellant Reynolds, pages 33-35, this Court should reverse the judgment on the ground that the restriction placed on the basic right of cross-examination was prejudicial error.

Respectfully submitted,

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⁵ On each of these three transactions the bank committed \$35,000 in mortgage loans; the assessed value of the property by its own appraisers was, respectively, \$45,000 (Gurfein), \$46,000 (Schaetsneider), and \$45,000 (Lyons). In most instances substantial assets were listed; the only significant liabilities listed were outstanding mortgages—on a current residence (which would be liquidated on the sale of the house). In every case the bank loaned at least \$10,000 less than the appraised value of the house. The exhibits (which include pictures of the homes built by RCC) are on file with the Clerk's Office of this Court.